REPORTS

OF

ADJUDGED CASES

In the COURTS of

Chancery, King's Bench, Common Pleas, and Exchequer,

FROM

Trinity Term in the second Year of King GEORGE I.

TO

Trinity Term in the twenty-first Year of King GEORGE II.

Taken and Collected by the Right Honourable

Sir JOHN STRANGE, Knt.

Late MASTER of the ROLLS.

Published by his Son, JOHN STRANGE, of the *Middle Temple*, Esq;

The SECOND EDITION, Revised and Corrected, with References to all the cotemporary Reporters; and other Improvements.

VOL. I.

LONDON:

Printed by the King's Law-Printers;

For Messrs. PAYNE, J. RIVINGTON and SONS, T. LONGMAN, W. STRAHAN, P. URIEL, B. TOVEY, G. ROBINSON, W. OTRIDGE, T, CADELL. E. BROOKE, Messrs. RICHARDSON and URQUHART, J. BEW, T. WHIELDON, and S. HAYES.

MDCCLXXXII.

To the RIGHT HONOURABLE

PHILIP

EARL of HARDWICKE,

Vifcount ROYSTON,

Baron HARDWICKE of Hardwicke in the County of Gloucefter,

Lord HIGH CHANCELLOR of GREAT BRITAIN,

Thefe Reports are, with the utmoft Refpect and Efteem, infcribed by

His LORDSHIP's

Moft obedient and obliged

Humble Servant,

John Strange.

THE

PREFACE.

THE profession of the law is already so overburthened with reports, that I think it necessary, that every man who prepares any thing of this kind for the press, should give some very particular reason for his doing so. And my reason is this:

Having during the first years of my attendance at *Westminster-hall* been pretty diligent and exact in taking and transcribing notes; I soon found, it introduced me to the honour of having them borrowed and transcribed by several of the Judges, and others. By this means they came into the hands of a Gentleman, who had a servant so corrupt, as clandestinely to make several copies, and sell them to persons, who had not the honour to deliver them up, when the villany was detected. This put me under an apprehension, that I should soon see some of them in (1) print. And as many of them were only arguments in causes never adjudged, and therefore of no use to the publick; I thought it necessary to select these which were

See Pref. to Bur. Rep.

(1) They were published under title of "Select Cases of Evidence," 8vo. See Wor. Bibl. Leg.

were actually adjudged, and collect them together, that I might at ever so short a warning have it in my power, by printing a genuine, to suppress any surreptitious edition. With this view I caused my clerk to transcribe such cases, as I thought would be proper; and if no accident happens, that obliges me to publish them in my life, they will remain to be dealt with, as they who come after me shall think fit.

J. Strange, the (2) Reporter.

(2) See St. Tri. XI. 233. Col. 1.

Trinity

Trinity Term 1716.

2 Georgii Regis. In B. R.

Thomas *Lord* Parker, *Chief Justice.*
Sir Littleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Justices.*
Sir John Pratt, *Knt.*
Sir Edward Northey, *Knt. Attorney General.*
John Fortescue Aland, *Esq*; *Solicitor General.*

Clark *versus* Elwick.

MR. *Reeve* moved the last term, That one of the witnesses to a submission to arbitration might be obliged to make affidavit thereof, in order to make it a rule of court pursuant to the *stat.* 9 & 10 *W.* 3. *c.* 15.

Rule made upon a witness to a submission to arbitration, to make affidavit of the execution. 10 Mod. 332. Barnes 58. S. P. In C. B.

The Solicitor General insisted, that affidavits are voluntary; but the reason of the witness's refusal in this case was, because the award was unfairly made, and they had no other remedy but this to prevent the submission being made a rule of court. *Sed per Curiam*, The hardship of this particular case will not at all vary our rule, which must be a standing method for the future: The act of parliament has appointed but this single way by affidavit; and we will not suffer a witness to evade it by his refusal. We force a witness to a bond by *subpœna*; and every witness does by his signing undertake to prove it

when required. And *Hil.* 6 *Geo. Singleton* v. *Bradley*, there was the ſame rule upon my oppoſing it.

Rule for the witneſs to make affidavit of the execution.

Dominus Rex *verſus* Winteringham.

Male et negligenter ſe geſſit too general in an indictment.

INdictment *quia male et negligenter ſe geſſit in executione of the office of conſtable*, quaſhed for being too general.

Bayley *verſus* Jenners.

A perſon qualifying himſelf after liſted ſhall be taken to be doing duty, and diſcharged upon common bail. 10 Mod. 347.

REEVE moved that defendant being a trooper might be diſcharged upon common bail; it appeared he was liſted 16th *May*, and arreſted 19th; and the queſtion was, whether he had ever performed duty; and the affidavit went no further than his learning to ride. The plaintiff inſiſted, that this is not doing duty as the act requires, but only in order to do duty.

Cur', It is doing duty, he receives his pay, and muſt be diſcharged upon common bail.

Dominus Rex *verſus* Wyndham.

3 Vin. Abr. 515. See this caſe at large.

THE defendant Sir *William Wyndham* being brought up by the Lieutenant of the *Tower*, Serjeant *Pengelly*, Mr. *Jefferies*, Mr. *Reeve* and Mr. *Hungerford* moved, that he might be admitted to bail, and offered ſeveral arguments to induce the court to bail him, which with the anſwers given thereto by Sir *Joſeph Jekyll*, Mr. Attorney and Solicitor, are comprized in the opinion of the court, which was delivered the laſt day of the term *ut ſequitur*.

Parker C. J. This is a commitment by the ſecretary of ſtate for high treaſon generally; it has been moved on behalf of Sir *William Wyndham*, that he might be admitted to bail. I ſhall take notice of the arguments on both ſides, and of the particular circumſtances of this caſe, which have been laid before the court, with as much clearneſs, as the little time we have had to conſider of the matter ſince it was ſpoke to, and the extraordinary buſineſs of this day, will permit me.

It

It has been admitted on all hands that the court has a discretionary power in this case; and I think the arguments which have been made use of by the counsel for Sir *William Wyndham* are upon these five points:

1. Exception, That the commitment is, *that he shall be kept safe and close*; it has been insisted, this is more than can be justified by law. This exception is offered without any authority to support it, and is against an infinite number of precedents. But admitting this were a good exception, the consequence would not be that we should discharge Sir *William Wyndham*, but only *quatenus* his being kept close. The *keeping him safe*, is only by way of admonition to the officer, to put him in mind of his duty, and the punishment which he must undergo in case of an escape. The common process which goes to the sheriff, commands him to take the defendant *et eum salvo custod'*.

Safe and close in a commitment is only by way of direction to the officer.

2. Exception has been taken, That the charge is not said to be upon oath; and if a secretary of state might commit people without oath, the whole nation would be their tenants at will. In answer to this, I must observe, as I did before, that the precedents are many of them so, and no authority has been cited in support of the objection. The not mentioning it to be upon oath, is not conclusive, that it was not upon oath. In *Ferguson*'s case this exception was over-ruled, *Trin.* 2 *W. & M.* and it was held in *Kendal*'s case, that an imprisonment may be without oath; and also in the House of Lords, that commitments may be without oath. If a man be taken with treasonable papers, he may be committed, and any magistrate may commit *super visum*, without oath.

Commitments may be without oath.

1 Salk. 347. 5 Mod. 78.

3. Exception, That the commitment is generally for high treason; and it has been urged, that some particular species of treason must be expressed, and that it must have so much certainty, as to appear to be high treason to the court. 2 *Inst.* 52, 591. I think this opinion is not to be maintained. We presume a magistrate does right, till the contrary appears; and it has never been held necessary to express the overt act in the commitment. My Lord *Coke* puts the case of treason *contra personam Regis*, and admits that to be sufficient.

Commitment for high treason generally, is good.

N. B. This exception had been overruled before in this term in the case of Mr. *Harvey* of *Combe*. 3 Vin. Abr. 534. pl. 9. 10 Mod. 334.

4. It has been argued in favour of this last exception, that the *habeas corpus* act supposes the crime to be specifically mentioned; because it provides, that no person shall be committed a second time for the same offence, after he has been once bailed; the consequence of which is, that the court must judge

 by

by the two commitments whether the offence be the ſame. This argument will appear of little weight, if we conſider how eaſy it is to vary the expreſſion in the ſecond commitment, and yet keep cloſe to the principal charge. Suppoſe a man is committed for levying war againſt the King, and after he is diſcharged, is again committed for compaſſing the death of the King: Theſe two facts appear very different upon the face of the commitments, and yet he that is charged with the one, may likewiſe be charged with the other; and if this objection ſhould be held good, the conſequence would be, that a man may be committed as often as the ſecretaries of ſtate can vary the expreſſion; for ſeveral ſpecies of treaſon may be the ſame fact.

5. The caſe of *Kendal* and *Roe*, 1 *Salk.* 347. 5 *Mod.* 78. has been relied upon by the counſel for Sir *William Wyndham* as a caſe in point. But I am of opinion, it will not come up to that now before us. They were committed by a warrant dated 24 *Oct.* 1695. being charged with aſſiſting to the eſcape of Sir *James Montgomery*, who was guilty of high treaſon. Exception was taken, that the treaſon of Sir *James Montgomery* was not expreſſed in the warrant; and the fact he was committed for might not be high treaſon, tho' mentioned to be ſo. The caſe did not turn upon that ſingle point, for it was held neceſſary, that Sir *James Montgomery* ſhould be averred guilty *of*, and committed *for* high treaſon. And becauſe both thoſe particulars were not expreſſed in the warrant, the defendants were admitted to bail. A commitment, it is true, for ſtealing fruit generally would not be good, becauſe if it was upon trees, it would be no felony. 2 *Inſt.* 52.

1 Anderſ. 297. Ruſh. Collect. 3 Car. There is a caſe in *Anderſon*, which was to be a direction for the future in making commitments, which is entred in the council book. In *Crofton*'s caſe, which is reported in 1 *Sid.* 78. 1 *Keb.* 305. it was reſolved, that a commitment for high treaſon generally is good. *Vaugh.* 142.

I think I have now taken notice of all the exceptions taken to the commitment. The next thing relied upon is the illneſs of Sir *William Wyndham*, which appears to be a diſtemper incident to the family. We are of opinion, that this is not ground enough ſingly, to induce the court to admit Sir *William* to bail: For it muſt be a preſent indiſpoſition, ariſing from the confinement; and ſo we held this term in the caſe 10 Mod. 334. of Mr. *Harvey* of *Coombe*, who ſtabbed himſelf after his examination; and was refuſed to be bailed, becauſe his illneſs was from an act of his own. But I ſhall not enlarge upon this head, ſince we are all of opinion, Sir *William Wyndham* ought to be bailed. There have been four terms paſſed ſince his

his commitment, and one assizes in *Somersetshire*, out of which county it has been hinted the ground of the complaint against Sir *William Wyndham* arises; and therefore there being no prosecution against him, he must be admitted to bail, himself in 10,000*l.* and four sureties in 5000*l.* each.

A year's imprisonment without any prosecution, inducement to the court to bail. Salk. 103. 2 Sid. 179.

Vernon *versus* Goodrich. In C. B.

THE plaintiff declares, that whereas she is possessed of an house in *Ipswich*, to which water was conveyed by a leaden pipe from the conduit house; the defendant nevertheless has placed *quaedam epistomia vocat. stopcocks in canali plumbeo praedicto*, and thereby hindered the water from coming to her house, and that the defendant has diverted great quantities of water, by which she lost the use of her house.

Where the plaintiff declares upon a possession only, and the defendant pleads *liberum tenementum*, the plaintiff must shew a title in the replication, and must not barely rely on traversing the defendant's title. Yelv. 147. Poph. 1. Salk. 335.

The defendant pleads, that at the time in the declaration, *et diu antea*, he was seised in fee of half an acre of ground, being his garden, and lying between the conduit house and the house of the plaintiff: And being so seised, he placed the said leaden pipe in his said garden, *ad utend' ill' ad ejus beneplacitum*; and therefore he fixed the said stopcocks, *prout ei bene licuit*, *quae sunt eadem*, *&c.*

Demurrer inde, *et pro causa*, *quod materia praed'*, *non est placitabilis in barram actionis praed*, *sed tantum in retardationem responsionis ad inde habend'*, *donec legalis titulus ad aquam praed' per ipsam* (the plaintiff) *ostensus fuerit.*

Selby Serjeant *pro quer.* That the plea is ill. It is not sufficient in this case for the defendant to say, it is his freehold; for that may be true, and yet the plaintiff be intitled to the watercourse. Where the plaintiff prescribes for *separal. piscar.* it is not enough for the defendant to say, it is his freehold. 17 *E.* 4. 6. *b.* 7. *a.* 10 *H.* 7. 24. *b.* 18 *H.* 6. 29. *b.* 34 *H.* 6. 28. *a.*

That the plea should not be generally in bar of the action, but only till the plaintiff shew a title. The defendant has given no answer to the diverting great quantities of water; and therefore he prayed judgment for the plaintiff.

Branthwayte Serjeant *contra.* That the plea is a good plea: Formerly the plaintiff must have set out a grant or prescription;

but it is ſince ſettled, that to ſay generally he is intitled, is enough againſt a wrong doer. But it is ſtill neceſſary to ſet out a grant or preſcription, when the action is againſt the owner of the land; and as this is laid generally, it is enough for the defendant to ſhew he is not a wrong doer. 1 *Ven.* 274, 319. 2 *Ven.* 186, 291. If treſpaſs is brought for erecting coneyboroughs to the prejudice of the common, it is enough for the defendant to ſhew himſelf lord of the manor. *Lutw.* 107. *Yelv.* 104.

Plow. 26. a. *et alibi* in that caſe, 5 Co. 121. a.

A plea to a common intent is good. And we may as well bring the matter of law before the court, as a jury. But it not being ſhewn for cauſe of demurrer, the plaintiff cannot take advantage of the plea's amounting to the general iſſue. 2 *Saund.* 401.

27 H. 8. 7. Finch Law 396.

We have pleaded *liberum tenementum.* And if the plaintiff has any title, ſhe may ſhew it in her replication. And by her demurrer ſhe admits ſhe has no title. If the treſpaſs was in another place, ſhe may ſhew it by new aſſignment.

Where the plaintiff claims an eaſement out of the defendant's ſoil, the declaration muſt ſet out the title.

King C. J. It is hard to ſay here are two charges. The wrong is the ſtopping the water, the carrying away is only aggravation. This declaration is upon a poſſeſſion, which is only good againſt a wrong doer, and therefore the plaintiff muſt ſhew a title. The defendant claims the ſoil, out of which the plaintiff claims an eaſement; and therefore ſhe muſt ſhew her title. If it had appeared in the declaration that it was the defendant's ſoil, and the plaintiff had not preſcribed, the declaration would have been bad.

Blencowe, *Tracy* and *Dormer* Juſtices, *accord'*, and the plaintiff afterwards diſcontinued upon payment of coſts.

Pariſhes of Pancras *and* Rumbald in Suſſex.

Juſtices of peace may ſuperſede their own order *quia improvide emanavit.*

ORDER of two juſtices for the removal of a poor perſon from the pariſh of *Pancras* to *Rumbald.* Within three days the juſtices, reciting that they were ſurprized, ſuperſede it, and command the churchwardens to return the former order to be cancelled.

Whitaker Serjeant inſiſted, That the juſtices could not iſſue ſuch a *ſuperſedeas*; and cited *Salk.* 472.

Seſſ. Caſ. 106.

Sed per Curiam, The *ſuperſedeas* is well ſent by the juſtices, and to prevent the charge of an appeal; and the laſt order was confirmed.

Michaelmas

Michaelmas Term

3 Georgii Regis. In B. R.

Thomas *Lord* Parker, *Chief Justice.*

Sir Littleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Justices.*
Sir John Pratt, *Knt.*

Sir Edward Northey, *Knt.* *Attorney General.*

John Fortescue Aland, *Esq*; *Solicitor General.*

Memorandum; Mr. Justice *Powys* was absent all this term, being indisposed with the gout.

Johnson *versus* Louth.

MR. Solicitor General moved, that the defendant, being a gunner, might be discharged upon common bail.

The gunner in a train of artillery is the same as a common soldier, and common bail sufficient. 10 Mod 346.

Baines contra. The gunner is appointed by warrant, and is in the nature of a commission officer, he receives 1 *s. per diem* pay, and takes an oath; and a gunner is so much esteemed, that it is very difficult for him to get leave to lay down his post.

Solicitor Gen. He is listed as common soldiers are, and is liable to all the penalties in the act of parliament as common soldiers are.

C. J. I am informed, that the gunner is within the description of a common soldier. The extraordinary pay is only in consideration of the skill which is requisite in his place.

Eyre and *Pratt* Justices, *accord*. And he was discharged upon common bail.

Rex *versus* Helling.

Intr. Trin. 2 Geo.

In orders for paying wages it ought to appear the service was relating to husbandry.

INdictment for not paying servants wages, reciting an order of two justices, whereby it appeared, that 9*l.* was due, which the defendant refused to pay, having had notice of the order.

Glyde pro defendente. The order is void. It does not set out the labour of the servant, and is only generally *pro salario*; the justices have only jurisdiction in case of husbandry; and the order ought to shew this was a matter within their jurisdiction.

Eyre J. The practice is, if an order be for paying wages, it is supposed to be such as the justices have power over. *Salk.* 441, 484.

C. J. and *Pratt* J. of another opinion. And *Hill sequente* the indictment was quashed.

Rex *versus* Powell & al'.

De scriptis decipiebant is too general in an indictment.

SIR *William Thomson* the Recorder moved to quash an indictment against the defendants, for deceiving one *Davila* of several lottery orders. It is *de scriptis bonis & catallis* of *Davila decipiebant et defraudabant*; this is trover in effect, and too generally laid. 2 *Rol. Abr.* 79. *Mod. Cas.* 311. *Et per Curiam*, This is too general, and was quashed without putting the defendant to demur to it.

Brett *versus* Minter & al'.

Intr. Hil. 1 Geo. rot. 318.

Where the plaintiff replies full age of the defendant, it is not necessary to lay a *venue* as it is of a release.

THIS was a writ of error *coram vobis*, and the error assigned was, that one of the defendants, being an infant, appeared by attorney. The plaintiff pleads, that he was of full age; to which the defendant demurred, and shewed for cause, that the plaintiff has shewn no place where the defendant was of age.

Fazakerley pro defendente. Infancy must be tried by the country, and therefore it is necessary to lay a *venue*. *Godb.* 382. *Collins* v. *Taylor*. *Latch* 194. And in *Trin.* 12 *Ann. Welless* v. *Glover*, a release was pleaded without a *venue*, and held ill, though it

it was insisted, that the name of the county in the margin was sufficient, to which it was answered, that the release might be in another place.

Branthwayte Serjeant *contra*. Incapacity of the person may be tried where the action is laid. The defendant is of age every where.

C. J. Full age is not local, as the executing a release; the place is no certainty of the fact, as it is in the case of a release. What is personal attends the person every where; if he is of full age any where, he is so every where.

Adjournatur; and the last day of the term the chief justice delivered the opinion of the court.

C. J. The qualities of the person are to be tried where the action is brought. Nonage to a release where the release is laid to be made. I have looked into the case of *Collins* v. *Taylor*, which is oddly reported; and therefore I perused the record, which is thus: The error assigned is appearance by attorney for an infant, then it goes on, *Eo quod videtur curiae*, that there is no venue; *Ideo consideratum est quod the defendant assignet errores de novo*: Then it is, *Eo quod defendens tali die* appeared by attorney *apud Westminster*, *quo tempore* he was an infant, &c. I think it was not necessary to mention all that, for it appeared upon the record. In this case, if there be any fault it is in the plaintiff in error, and the defendant had nothing to do but to follow him.

Qualities of the person triable where the action is brought. *Vide* Mod. Cas. Lett v. Mills, Salk. 6.

Lill. Entr. 489.

Judgment affirmed.

Dominus Rex *versus* Bishop.

DEfendant was convicted of printing a seditious libel, and appearing to be in a very ill state of health, was brought up, and moved for the judgment of the court, and to be admitted to bail.

Convict for a libel being ill, was bailed before judgment.

C. J. The offence is so great that an adequate punishment may endanger his life, and to lessen the judgment would be an ill precedent; therefore bail him for the present, and we will give judgment when he is better. Defendant in 2000*l*. two sureties in 1000*l*.

N. B. He died within a few days after.

Dominus

Dominus Rex *versus* Inhabitants of Hyworth.

Order to pay money to a poor person must mention him to be poor and impotent.

ORDER to pay 3*s.* weekly to *A.* by the parish of *Hyworth*, so long as he shall continue poor.

Martin. By the statute 43 *Eliz.* *c.* 2. it ought to appear, they are poor and impotent. 1 *Keb.* 489. 2 *Keb.* 744, 643. *Pasch.* 1 *Geo.* *Rex* v. *Cully.* An order for a father to pay so much to his daughter was quashed, because not said *poor and impotent*, but only that she is in a poor and destitute condition, and wants relief. 5 *Mod.* 197. And *poor* is to be understood, *poor old*, *poor blind*, *poor impotent.*

C. J. I favour these orders as much as I can, because no body takes care to draw them up for the poor. But it must be quashed.

Pasch. 3 *Geo.* *Rex* v. *Inhabitants of Stoke-Ursey.* On the authority of this case an order was quashed for the same fault. So *Pasch.* 4 *Geo.* *Rex* v. *Tipper*, an order to maintain a daughter-in-law.

Parishes of Holy Trinity *and* Shoreditch.

A. is bound to *B.* but serves *C.* his settlement is in *C.*'s parish. Sess. Cas. 112. pl. 107. Foley. 216. 2 Str. 1001. post 554.

PARKER, C. J. delivered the resolution of the court.

This is an order for the removal of one *Ferrer* from the parish of *Holy Trinity* to *Shoreditch*: by which it appears, that *Ferrer* was bound as an apprentice to one *Truby*, with intent that he should serve *Green*; which he did for three years. And it has been insisted, that he being bound to *Truby*, who lives in *Trinity* parish, his settlement is there; and not in *Shoreditch*, where the service was.

Salk. 68. Difference between apprentices and other servants.

But we are of opinion the justices have done right in sending him to *Shoreditch*, where the service actually was. It is the same thing as if *Truby* had turned him over to *Green*; in which case there would have been no question, but he had gained a settlement in *Green*'s parish. If the master removes out of one parish into another, the apprentice gains a settlement if he lives there forty days. The turning over an apprentice is like the assigning any deed. In this case *Truby* was only a trustee. There is a great deal of difference between apprentices and other servants; for apprentices are not presumed to become chargeable, because the trade and mistery they learn is their estate. Therefore the order must be confirmed.

Garner

Garner *verfus* Anderfon.

IN replevin out of the county court, the plaintiff declared for taking his cart and four horfes in *Nithingall-lane* in the parifh of *Stepney*. The defendant pleads in abatement, that he took the goods in *Nithingall-lane* in the parifh of *St. John Wapping*, *abfque hoc* that he took them in *Nithingall-lane* in the parifh of *Stepney*. *Et pro retorn' habend'* he fets forth his title to the goods as a Deodand.

Declaration in replevin amended after plea in abatement. Paf. 1 Geo. 2. On the authority of this cafe the parifh was amended, *inter Lord Gage and Robinfon*, after the fame plea in abatement.

Hall Serjeant moved to amend the declaration, and alledge the place to be in the parifh of *St. John Wapping*; for the one fide of the lane to the caufey is by act of parliament in the parifh of *Stepney*, and the other fide in the parifh of *St. John Wapping*, and the goods were taken in that fide of the lane which is in *Wapping*. The fact was, that a fervant of the plaintiff's was driving a cart, and by chance he run over and killed a child; upon which the defendant feized the cart and horfes as a Deodand, and the fervant was tried for the murder, and found *per infortunium*.

Branthwayte Serjeant *contra*. If this fhould be amended, all pleas in abatement will be fet afide. *Pafch.* 2 *Ann. Leper* v. *Germain*. *Affumpfit* was brought by bill againft defendant as a knight, he pleads in abatement that he is a knight and baronet; and the court refufed an amendment. *Hil.* 1 *Geo. Mears* v. *Bowes in C. B.* was the fame cafe as this, and the court would not grant an amendment. Nothing is removed out of the county court but the plaint only; and therefore if iffue is joined in the county court, the plaintiff muft declare *de novo*.

1 Salk. 50.

C. J. In the cafe of *Leper* v. *Germain* there could not be any amendment, becaufe the commencement of the fuit was wrong, and nothing to amend by. The foundation of amendments by the court, whilft the proceedings remain in paper before they be recorded, is, That thefe papers, delivered to and fro, fupply the declaring and pleading *ore tenus* at the bar, and may be amended as eafily as if fpoke at the bar. Thefe faults ftiled errors of the clerk are amendable after the proceedings are recorded.

Afterwards upon deliberation the court granted leave to amend upon payment of cofts.

Thruftout

Thruſtout *verſus* Peake & al'.

Int. Trin. 8 Ann. rot. 108.

Deviſe to *A.* and *B.* for their lives, equally to be divided, and after their deceaſes to their heirs male of their bodies, equally to be divided, and if either of them die without iſſue, then to the ſurvivor and his heirs male. *A.* and *B.* make partition, and *B.* levies a fine and ſuffers a recovery of his part, and dies without iſſue. The entry of *A.* is taken away, and no title accrues to him by the ſurvivorſhip. 8 Vin. Abr. 238. pl. 11.

UPON Not guilty in ejectment for the manor of *Welhall* and other lands in *Com' Norf'*, on the demiſe of *Edmund Miller* Serjeant at law, the jury find this ſpecial verdict.

That *Roger Weſt* being ſeiſed in fee *(inter alia)* of the premiſſes in queſtion 23 *March* 1697, made his will in writing, wherein was the following clauſe, "And my further will is, and "I declare, that if it ſhall happen, that at the time of my death, "I ſhall leave no child or children begotten by me on the body "of my ſaid dear wife, or if ſhe be not with child or breeding at "the time of my death, then I give, deviſe and bequeath all "and ſingular my manors, lands, tenements, &c. which are "freehold, in the counties of *Bucks*, *Hertford* and *Norfolk*, or "elſewhere in the kingdom of *England*, unto my aforeſaid "dear wife for and during her natural life, or ſo long thereof as "ſhe ſhall remain my widow. And *as for my eſtate* in the "county of *Norfolk* not as yet any ways diſpoſed of, but to "my ſaid wife for life or widowhood as aforeſaid, I hereby "give, deviſe and bequeath the ſame, after the deceaſe or marriage of my ſaid wife as aforeſaid, unto my nephews *Edmund* "*Miller* and *Robert Sharrock* during their natural lives, *equally to* "*be divided between them, and after their deceaſes then to the next* "*heirs male of their bodies lawfully to be begotten, equally to be divided between them*; but in caſe either of them the ſaid *Edmund Miller* and *Robert Sharrock* depart this life without ſuch "iſſue, then I give, deviſe and bequeath the ſame eſtate in "*Norfolk* to the other of them for life, and after his deceaſe to "the heirs males of his body lawfully to be begotten." And for want of ſuch iſſue of both of them, he deviſed it over to others, with a remainder to his own right heirs, and then goes on; "Provided always, that if any of the deviſees ſhall fell timber, other than for repairs or firewood or likely to decay, "it ſhould be a forfeiture of their particular and reſpective "eſtates."

Pollexf. 428.

They find further, that *Elizabeth* wife of the teſtator died in his life-time, and afterwards the deviſor died without iſſue. That the two deviſees *Edmund Miller* and *Robert Sharrock* entred

entred and were seised *prout lex postulat*; and by their indenture dated 5 *May* 1700, reciting the devise, and to the end that each party may know and enjoy his own share and moiety in severalty, "They the said *Edmund Miller* and *Robert Sharrock* "do by these presents, for themselves and their heirs males, "make and deliver an equal, perfect and absolute partition of "all the said manors, lands, &c. to and between the said "*Edmund Miller* and *Robert Sharrock* in two parts, in manner "and form following, (*viz.*) That he the said *Edmund Miller*, "and the next heirs male of his body, shall have, hold and "enjoy to his and their own several use, according to the "limitations in the said recited will expressed, *but for no greater* "*or other estate, or quantity of estate, than he or they can or may* "*have by virtue of the said* Roger West's *will*, all that the "manor, &c. in full satisfaction of all his the said *Edmund* "*Miller*'s and his next heirs male mentioned in the said will, "part, portion, share and moiety, *but for no greater or other* "*estate than he can or ought to take by virtue of the said will.* "So in like manner, that *Robert Sharrock* shall hold and enjoy "*all that the manor of* Wellhall *in* Gayton, &c. and each co-"venanted to rest contented therewith." That *Edmund Miller* and *Robert Sharrock* entred and enjoyed their parts in severalty. That *John Lyng* prosecuted a writ of covenant *de manerio de Gayton Wellhall* against *Robert Sharrock*, *teste* 2 *Oct.* 13 *W.* 3. *ret' Octabis Martini*, on which a fine was levied. And that by deed dated 2 *Oct.* 13 *W.* 3. it was covenanted between *Robert Sharrock*, *John Lyng* and *John Carter*, That *Robert Sharrock* should levy a fine to *John Lyng of the manor of* Wellhall *in* Gayton, to the intent to suffer a common recovery, and that *John Carter*, before the end of *Michaelmas* term then next ensuing, should sue a writ of entry *sur disseisin en le post* against *John Lyng*, who should vouch *Robert Sharrock*; which fine and recovery then to be levied and suffered should be to the use of the said *Robert Sharrock* in fee. That though this deed was dated 2 *Oct.* 13 *W.* 3. yet it was not executed till 26th *November* following, but nevertheless that it was executed before the suffering the recovery at bar. And that there is no other declaration of the uses than as aforesaid. That *John Carter* sued a writ of entry *de manerio de Gayton, Wellhall*, *teste* 16 *Oct.* 13 *W.* 3. *ret' Crastino Animarum*, upon which a common recovery was suffered, (which is found *in hæc verba*) and a writ of seisin thereupon prosecuted by the said *John Carter teste* 6 *November*, returnable *indilate*; upon which the sheriff returned, that he delivered seisin 24 *November*, which is two days before the execution of the deed. That the lands in the fine and recovery are the part allotted by the deed of partition to *Robert Sharrock*, and mentioned in the deed of 2 *October*, 13 *W.* 3. That 16 *February*, 1707, *Robert Sharrock* so seised died without issue, and that *Elizabeth Sharrock* his sister and heir entred, and married *Patrick Seagrave*, Esq; who became seised in

in right of his wife, upon whom the lessor of the plaintiff entred, and made the lease, and was possessed until ejected by the defendants, *sed utrum, &c.*

Reeve pro quer' argued, *First*, That the two devisees *Edmund Miller* and *Robert Sharrock* take only estates for their lives as tenants in common, with cross remainders for their lives; and that the devise *to their next heirs male* is a remainder in contingency only, and not executed. If it had been to them for life, remainder to their heirs male, it had been an estate-tail executed. 1 *Co.* 66. *Archer's* case. Where by a devise to *Robert Archer* for life, and after to the next heir male of *Robert*, and to the heirs male of the body of such next heir male, it was adjudged, that *Robert* took only an estate for life. (*1st*), Because he had an express estate for life devised to him; and (*2dly*), The remainder was limited to his next heir male in the singular number; though that second reason given in *Archer's* case was denied for law, because *heir* is *nomen collectivum*, and one can have but one heir at once, and this shall go from heir to heir. *Cro. Eliz.* 313. 1 *Roll. Abr.* 822. *K. pl.* 1. *Owen* 148. *Clark* v. *Day*. Yet *Archer's* case is good law; the true reason of that judgment was, because the words of limitation *to the heirs male of the body of such next heir male* were added to the *heir*; therefore *heir* was construed to be *designatio personæ*. 1 *Vent.* 216, 232. In the case at bar it is limited, by express words, That they shall have but for life, and then consequently the heirs shall take as purchasers.

2dly, The words *equally to be divided* being added to the *heirs male*, as well as to the two devisees, prove the intent of the testator to be, that the heirs male should take as purchasors, and not by way of limitation. Had the devise been to the two devisees and to their heirs males, equally to be divided, these words *equally to be divided* might have been applied to the two devisees; but here it being twice repeated, the last must be rejected, if the heirs are to take only by way of limitation. These words in a will make a tenancy in common. 3 *Co.* 39. *b.* 2 *Rol. Abr.* 89. *Salk.* 390, 391. 1 *Vent.* 376. 2 *Vent.* 365.

The rule will be objected, when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is mediately or immediately limited to his heirs in fee, or in tail, that always in such case *his heirs* are words of limitation of the estate, and not words of purchase. As to that rule, it only holds place where the remainder is executed, and not when the remainder is in contingency. 2 *Rol. Abr.* 418. *H. pl.* 5. *Lit. Rep.* 258.

3*dly*, The proviso in the will for the devisees to forfeit on cutting down timber, proves the devise to be but an estate for life; for if it is an estate-tail the proviso is void. 1 *Vent.* 216, 232. *King* v. *Melling*. Such an argument from the proviso is a forcible one.

2*dly*, Whether the two devisees shall not have cross remainders for their lives by implication, with a remainder to their next heirs males in contingency only, and not executed; so that after the death of the one, the survivor shall have an estate for life in the whole, and not the heir male of the person deceased. *After their deceases* in the will shall be taken jointly, (that is) after both their deceases it shall remain to their next heirs male. Such a construction shall be made in the case of a will, but in the case of a conveyance at common law such words may be construed distributively, so that after the decease of either, his part shall remain to his next heir male. 5 *Co.* 7. *Wyndham*'s case. The words of a will shall be always followed, except the intent of the testator appear in the will to be contradictory to the words. 2 *Jones* 172. *Raym.* 452. *Holmes* v. *Meynell*, a case in point. 4 *Leon.* 14. Pollexf. 125.

If they take but an estate for life, the fine and recovery by *Robert Sharrock* was a forfeiture of his estate, and a right of entry was given to the other devisee (the lessor of the plaintiff) which is sufficient to preserve a contingent remainder. 1 *Vent.* 188. *Trin.* 6 *Annæ*, *Tuckerman* v. *Jeffery*. That was a devise to two *femes*, *Elizabeth* and *Jane* for their lives, equally to be divided between them, remainder to the heirs of *Jane*. *Jane* died, and *Elizabeth* survived; and the question was, Whether *Elizabeth* should have the whole during her life, or the heir of *Jane* have that part immediately whereof *Jane* died seised? And the court held, that *Elizabeth* and *Jane* were joint-tenants, and that consequently the survivor should have the whole during her life, and the heir of *Jane* have nothing till the death of *Elizabeth*. Therefore this construction answers the words *after their deceases*, and does not destroy the authority of the case of *Holmes* v. *Meynell*.

Devise to *A.* and *B.* jointly for life, remainder to the heirs of *A.* they are joint-tenants, and the survivor shall have the whole for life. *Vide* Co. Lit. 184. a.

3*dly*, The following part of the devise, *If either of them depart this life without issue, then I give the same estate to the other of them for life*, cannot make it to be an estate-tail executed. 1. Because an express estate for life is only devised to them. 2. If it is an estate-tail it must be by implication, which is contrary to the rule of law, That no implication shall be allowed against the express words of a devise. *Cro. Eliz.* 313. *Owen* 148. *Moor* 593. 1 *Rol. Abr.* 839. *pl.* 4. 11. which reports do differ.

C. J.

C. J. And neither of them right.

Reeve. Thofe words cannot create it an eftate-tail, by reafon of the intervening contingent remainders to the next heirs male of their bodies. *Cro. Eliz.* 315. *Cordall's* cafe. Where upon a devife to *Edward Cordall* for life, remainder to his firft fon, remainder to the heirs of the body of *Edward Cordall*, he then having no fon, it was refolved, that the eftate-tail was not executed, for the poffibility of the mefne eftate intervening, and therefore it was disjoined during the life of *Edward Cordall*; though that cafe has been denied for law. 2 *Saund.* 386. And it has fince been adjudged, that the remainder fhall be vefted, till the contingent remainder comes *in effe*, and then the eftates fhall be opened and disjoined for the letting in of the contingent remainder, becaufe they were all created together by the fame conveyance. 11 *Co.* 80. *Lewis Bowles's* cafe. 1 *Sid.* 83. 1 *Lev.* 36. 1 *Saund.* 386. 1 *Vent.* 345.

If they are jointenants for life, the queftion will be, what the fine, recovery and deed of partition have done. They cannot affect the remainder, whether contingent or executed, nor alter the quality or quantity of the eftate devifed. The deed can amount only to an agreement, of what lands each party fhall receive the profits. Though it is recited to be, *to the end that each might know his part in feveralty*, yet the deed is only, that each fhall hold the lands according to the limitations of the will.

The recovery is found *in hæc verba*, and appears to be no more than the hiftory of a recovery. It is in the preterperfect tenfe, *J. C. petiit*, and not *petit*.

Eyre J. That cannot be taken advantage of here.

Reeve. The fine and recovery are not of the fame manor, as the deed to make the tenant to the *præcipe*. The one is *de manerio de Gayton Wellhall*, and the other is *de manerio de Gayton in Wellhall*; and though the jury find the lands in the fine and recovery to be the fame as in the deed, yet they do not find the manor to be the fame. The fine and recovery are void, for there is no tenant to the *præcipe*; for the recovery is had, and judgment given, before the *tefte* of the writ of feifin, which is 6 *November*, and feifin delivered the 24th, and the deed is exprefsly found not executed until the 26th. And the finding the deed executed before the recovery had at bar, being contrary to the record, is void. 11 *H.* 6. 42. The finding a perfon dead, who appeared in

2 court

court at the trial, was held to be a void finding. And therefore he prayed judgment for the plaintiff.

Branthwayte Serjeant *pro defendente*, admitted that this was a tenancy in common; but he argued, that it is an eſtate-tail, and not an eſtate for life only. The words *equally to be divided between them* were only to ſhew, that the teſtator intended a tenancy in common. *Cro. El.* 695. *Lewen* v. *Cox*. *Archer's* caſe was adjudged but an eſtate for life, by reaſon of the limitation upon a limitation, (*viz.*) to the heirs of the next heir male, which limitation is not the caſe at bar. The intent of the teſtator will be beſt made out, by conſtruing this an eſtate-tail; for he plainly deſigned the eſtate ſhould go in the family. Though it is expreſsly given to him for life, and after his deceaſe to his next heirs male, yet it is an eſtate-tail. *Carter* 170. 2 *Lev.* 58. 3 *Keb.* 42. 1 *Ven.* 214, 225. *Pollexfen* 101. *King* v. *Melling*.

1 Co. 66.

Deviſe to *A.* for life, and after his deceaſe to his heirs male, is an eſtate-tail, and not a bare eſtate for life with a remainder.

C. J. That is certainly ſo, you need not labour that conſtruction.

Branthwayte. The partition alters the quality, though not the quantity, of the eſtate. For the intent of the deed was, for each party to enjoy in ſeveralty. *Biſhop of Sarum* v. *Philips*, 11 *W.* 3. *rot.* 377. *termino Mich. in B. R.* On a writ of error of a judgment in *C. B.* in a *quare impedit*, where the plaintiff ſets forth, that *A.* and *B.* were jointenants of an advowſon in groſs, and by deed agreed to preſent by turns, and as tenants in common; and it was adjudged, that this deed amounted to a partition, and ſo the part allotted to *B.* deſcended to his iſſue; and a grant from the iſſue, under which the plaintiff claimed, was held good. Tenants in tail may make a partition, and thereby bind their iſſue, if it is equal, if unequal, it will bind themſelves only. As to the exception, that there is no tenant to the *præcipe*; it is ſufficient if there be one at any time before the judgment. *Show.* 347. *Salk.* 568. And therefore he prayed judgment for the defendant.

1 Salk. 43, 754.

Reeve replied, Here is no tenant till after judgment. An advowſon may be parted, ſo as to preſent by turns; but by this deed they agree to continue ſeiſed of the ſame eſtate.

C. J. The partition will not alter the eſtate, it only alters the right of ſurvivorſhip. The difference in the names of the manor is not material. It appears there is no tenant made by deed, till after judgment. But the fine being levied and no uſe declared, the recovery being immediately ſuffered of the ſame

If a fine is levied, and no uſe declared, and a recovery had immediately againſt the conuzee, the fine ſhall be taken to make him a tenant to the *præcipe*. Salk. 676.

same lands, and the writ of entry brought against the conuzee in the fine, shews that the intent of levying the fine was to make a tenant to the *praecipe*. This devise intends an estate-tail. *After their deceases* are but words of form; for if one devises to *A.* for life, and after his decease to *B.* for life, yet *B.* shall take the estate if *A.* forfeits, enters into religion, or becomes incapable to enjoy it; and he shall not wait till the decease of *A*: for the words were not meant as conditions. *Salk.* 230. 1 *Ven.* 199. What the jury mean, that the deed was executed before the recovery had at bar, I know not; for the law takes no notice, when a recovery is had at bar.

Eyre J. *Equally to be divided* is no more, than if one moiety had been devised to one, and the other to the other; unless something appears contrary in the will. Here can be no cross remainders springing after the death of one of the devisees, because it is limited *if either die, &c.* When a writ of entry is brought against the conuzee in a fine, there is no resulting use.

Pratt J. *accord'*, and judgment *pro defendente nisi, &c.* and absolute afterwards, no cause being shewn.

Dominus Rex *versus* Bigg.

The writing cross the face of a bank note, is properly called an indorsement. 3 P. Wil. Rep. 419.

THE indictment sets forth, that 19 *Feb.* 1714. *Joshua Odams* being employed and entrusted by the governor and company of the Bank of *England*, to make and sign bank notes, made and signed a bank note for 100 *l.* payable to *James White*, or bearer, 90 *l.* whereof was 22 *Feb.* 1714, paid to the bearer, and indorsed upon the said note, which indorsement the defendant 1 *Mar.* 1714. *erasit contra pacem, &c.*

The defendant pleads not guilty, and the jury find this special verdict.

That *Joshua Odams* was employed, and made the note as in the indictment set forth, and that 90 *l.* thereof was paid and indorsed *prout, &c.* That the defendant 1 *Mar.* 1714. with a certain liquor to the jury unknown, *totaliter expunxit et delevit* the words, letters and figures of the indorsement. That from the time of making the act 8 & 9 *W.* 3. *c.* 20. to 28 *November* 1797. the method of the company was to write the indorsements upon the backsides of their notes in black ink. But that ever since, the method has been, to write the payments upon the face of the notes, cross the writing, in red ink; which last mentioned writing has always ever since been called and esteemed an indorsement, upon such notes, *sed utrum, &c.*

This

This cause was argued at *Serjeant's Inn*, in *Fleet-street*, before all the Judges. And the question was, whether the fact found by the jury would come within the general words of the indictment, and could properly be called an indorsement?

The defendant's counsel insisted, that the word *indorsement* signified a writing upon the backside of any deed or paper, 2 *Mod. Cas.* 86. *Salk.* 375. and that it being found, that the words razed out by the defendant were wrote upon the face of the note, he was no ways guilty of the fact in the indictment.

But it was held by all the Judges, That the defendant was guilty. For the writing upon the face of the note was of the same effect as an indorsement, and being introduced by the company in the room of writing upon the backside, and always accepted and taken to be an indorsement, was within the words of the indictment.

Accordingly at the next sessions of *oyer* and *terminer*, *King* C. J. of *C. B.* delivered the opinion of the Judges; and sentence was pronounced against the defendant; who was afterwards pardoned, upon condition to transport himself to *Minorca*.

Dominus Rex *versus* Dawson.

At Serjeants Inn *in* Fleet-street *before all the Judges.*

Fabricavit in an indictment denotes forgery, and evidence of altering or razing will be good.

INdictment for that the defendant *tali die anno et loco* a bank note for the payment of 520 *l. fabricavit et contrafecit.* Upon not guilty the jury find a special verdict.

That *Conrade de Gols* being a person entrusted and employed by the governor and company of the Bank of *England*, 16 *January* 1715. made and signed a bank note for 220 *l.* which note was delivered to the defendant unaltered, who *crasit et alteravit* the said note, by turning the word *two* into the word *five*, whereby the said note, which was made only for 220 *l.* purported to be a note for 520 *l.* by colour whereof the defendant had and received of the Bank 520 *l. sed utrum*, &c.

The counsel for the defendant insisted, that the facts found in the verdict were not included in the general words of the indictment, *fabricavit et contrafecit*. That this was not counterfeiting or making a note, but only altering a note made. That this must be admitted to be a crime within the words of 8 & 9 *W.* 3. *c.* 20. concerning the Bank. But as the indictment is

not for altering or razing, they prayed judgment for the defendant.

But the Judges were of opinion, that the indictment is well enough, for this was a plain forgery, if not a counterfeit, and *fabricavit* would denote as much.

Accordingly at the next fessions *King* C. J. of *C. B.* delivered the opinion of the Judges, and fentence was pronounced againft the defendant, who was pardoned, upon condition to tranfport himfelf to *Minorca*.

Elwell *verfus* Quafh & al'.

The warrant of one executor is not fufficient to enter judgment againft the other.

THERE were three executors, one of which gave a warrant of attorney to confefs a judgment againft himfelf and his co-executors, purfuant to which a judgment was entered againft all the executors *de bonis teftatoris* for the debt, and againft the executor, who gave the warrant, *de bonis propriis* for the cofts.

Upon motion to fet this afide, it was held to be ill, for executors may plead different pleas, and that which is moft for the teftator's advantage fhall be received. 1 *Roll. Abr.* 929. *A.* 1. *B.* 5.

Lucas 323.

So *Paf.* 1 *Geo. in C. B. Baldwin* v. *Church*, one executor pleaded a good plea, and the other a bad one; and on demurrer judgment was given *in C. B.* for both the defendants, but reverfed on error, and a new judgment given for the plaintiff againft one executor only. This is really eftopping the others from faying they are not executors, and being without their knowledge, it may be fubjecting them to a *devaftavit* for the paying of other debts.

The judgment was fet afide.

Hilary Term,

3 Georgii Regis. In B. R.

Thomas *Lord* Parker, *Chief Justice.*

Sir Littleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Justices.*
Sir John Pratt, *Knt.*

Sir Edward Northey, *Knt. Attorney General.*

Sir William Thompson, *Knt. Recorder of* London, *Solicitor General.*

Dominus Rex *versus* Fox.

Information against a justice for absenting from the sessions.

THE defendant being mayor of *Totness* the last year, was by the charter a justice of peace for the following year, without whom the sessions could not be held. And the court granted an information against him for a voluntary absence.

Cole *and* Hawkins.

Intr. Pas. 12 Ann. rot. 254 *or* 258.

In an *indebitatus assumpsit* the day is not material, and the alleging a different time in the replication is no departure. Gilb. Cas. 279. 10 Mod. 251.

PARKER, C. J. delivered the resolution of the court.

This is an *indebitatus assumpsit*, laid 16 *January* 1706. The defendant has pleaded *actio non accrevit infra sex annos*. The plaintiff has replied a bill filed 23 *January*, 12 *Ann.* and that the cause of action arose within six years before. The defendant has demurred generally, and it has been insisted on by his counsel

 that

that the replication is a departure, there being ſeven years diſtance between the day in the declaration, and the filing the bill as ſet forth in the replication.

But we are all of opinion notwithſtanding that the plaintiff muſt have judgment. This being only a parol promiſe, the time alledged in the declaration is only matter of form, not of ſubſtance; and not being a departure in a material point, is only a defect in form of pleading, which not being ſhewn for cauſe of demurrer purſuant to the act for the amendment of the law, the defendant cannot take advantage of it. If a verdict had found the promiſe, or the filing the bill to be another day, within the ſix years, that would not have vitiated the proceedings. 1 *Lev.* 110. 1 *Keb.* 566, 578. *Hob.* 164, 199.

1 Salk. 222, 223. But in caſe upon a promiſſory note it is.

If the day had been ſubſtance, it would have been a departure; and ſo it was adjudged in this court, *Paſ.* 1 *Geo.* *Stafford* v. *Forcer*. That was upon a promiſſory note dated in 1704. The defendant pleaded *actio non accrevit infra ſex annos*; the plaintiff replied a bill filed 12 *Ann.* and after a verdict the judgment was arreſted, becauſe in that caſe the day was material. If the day in this caſe ſhould be looked upon as ſuch, it would be in the defendant's power in almoſt all caſes to fix the time and place. As where the plaintiff brings an action of aſſault and battery in *London*, the defendant pleads he made the aſſault in *Middleſex*, and that afterwards the plaintiff releaſed all batteries except in *London*. By this he would make the place material, and the doctrine of bringing tranſitory actions where the plaintiff pleaſed, would fall to the ground, if the defendant ſhould be allowed by artificial pleading to make the time and place matter of ſubſtance. *Vide Co. Litt.* 282. *b.* *Yel.* 114.

2 Stra. 806. S. P. accord.

Judic' pro quer.'

Dominus Rex *verſus Bond*.

Filing of an inquiſition taken *ſuper viſum corporis* five years after the death, when only the head was to be found, ſtaid.

INquiſition taken *ſuper viſum corporis* of a man that hanged himſelf; and the jury find him poſſeſſed of a meſſuage, which as a *felo de ſe* he forfeited.

Pengelly Serjeant moved, to ſtay the filing of this inquiſition, upon an *affidavit* that the man died five years before, and the coroner dug up a ſkull, which he aſſured the jury he knew by a particular mark was the deceaſed's; and thereupon the inquiſition was taken: Which he inſiſted ought to have been upon view of the whole body, that the marks if any may appear.

The jury ought to view the whole body.

Regina

Regina v. *Clerk*, the court held that ſeven months was too late. *Salk*. 377. 2 *Mod. Ca*. 16.

Cur', Stay the filing till further motion.

Hawkſhaw *verſus* Rawlings.

DEBT upon a bond. The defendant craved *oyer* of the bond, *et ei legitur*, *&c. petit etiam auditum conditionis ejuſdem ſcripti*, *et ei legitur in haec verba*, *ſcilicet*; which appears to be for the defendant and two other obligors, joined in the bond, to pay money at a future day, *quibus lectis* he pleads payment at the day by the other two obligors, and an acceptance by the plaintiff in ſatisfaction. The plaintiff, *proteſtando* that the other two did not pay, for plea ſays he did not receive in ſatisfaction *modo et forma*; and thereupon iſſue is joined, and a verdict for the plaintiff.

Where the defendant pleads a payment and acceptance in ſatisfaction, the plaintiff may take iſſue upon the acceptance, which will be an argumentative denier of the payment.

Sir *William Thompſon* moved, that a repleader might be awarded, for that this is an immaterial iſſue, the payment, and not the receipt, being proper to be put in iſſue.

Reeve of the ſame ſide. The bond being no where ſet forth in the *oyer*, but only the condition; it does not appear upon the record, that the two perſons who, it is pleaded, made the payment, were bound in the bond: For the action againſt the defendant is *quatenus* upon a ſingle bond, and then this payment will amount to no more, than a payment by a ſtranger, which will make the iſſue an immaterial one.

Sir *Robert Raymond contra*. It muſt be admitted, that there can be no payment in ſatisfaction, without a receipt in ſatisfaction: And therefore the denying the acceptance, is an argumentative iſſue, and will be good after a verdict. *Styles* 239. in *Mich*. 7 *W*. 3. *Young* v. *Rudd*. *Indebitatus aſſumpſit* for apothecaries wares; the defendant pleaded the delivery of a beaver hat, which the plaintiff received in ſatisfaction; the plaintiff, *proteſtando* that he did not give it in ſatisfaction, *pro placito* ſaith, that he did not receive it; and this was held a good iſſue. *Vide Hob*. 178. *Sty*. 239, 263. Salk. 627.

As to the ſecond exception. If that be wrong it is amendable. The *oyer* is at the plaintiff's requeſt, and ſhould have been ſet out by him, which he neglecting to do, ſhall not take advantage of his own default. Admitting the payment is not by the two obligors, but ſtrangers, yet where the defendant admits the plaintiff's cauſe of action, and pleads matter which is

 not

not a legal difcharge, if iffue be joined upon that, and a verdict againft him, the plaintiff fhall have judgment. 5 *Co.* 43. *Nicoll's* cafe.

Payment by a ftranger not good, but acceptance is.
If a creditor has different debts, he may apply the payment to which he will.
&c.
2 Mod. Ca. 123.
2 Chan. Ca. 83.

C. J. Although payment by a ftranger be not a legal difcharge, yet acceptance in fatisfaction is. Suppofe a man owes me 100*l.* upon bond, and another 100*l.* upon another account, and he pays me 100*l.* I may apply it to which I will; and tho' he paid it in fatisfaction of the bond, yet if I did not receive as fuch, it will be no difcharge of the bond. And therefore in thefe cafes the acceptance is the clearer iffue. There are two requifites to work a difcharge, 1. Payment, 2. Acceptance. And a traverfe of the acceptance, is an argumentative denial of the payment.

No payment in fatisfaction without an acceptance.

Pratt J. If by neceffary confequence the replication denies the plea, and a verdict pafs, the court may give judgment. There can be no payment in fatisfaction, without an acceptance in fatisfaction. And if the plaintiff fays, that he did not accept in fatisfaction; the confequence is, that it was not paid in fatisfaction.

Judgment *pro quer'.*

Andrews *verfus* Franklin.

To pay within two months after a fhip is paid off, is good in a promiffory note.

CASE upon a promiffory note to pay within two months after fuch a fhip is paid off, and counts upon the ftatute.

Fortefc. Rep. 281.
10 Mod. 294, 316.
1 Bur. Rep. 323. S. P. accord.

Branthwayte Serjeant infifted, That this is not negotiable, it being upon a contingency which may never happen. *Jocelyn* v. *Laferre*, *Hil.* 11 *Ann. rot* 214. in *B. R.* upon a writ of error, was a bill to pay out of the drawer's growing fubfiftence, and that was held not to be negotiable as a bill of exchange.

Sed per Curiam, The paying off the fhip is a thing of a publick nature, and this is negotiable as a promiffory note.

Judgment *pro quer'.*

Goodright

Goodright *versus* Wright.

Intr. Hil. 11 Ann. rot. 412.

S. C. 1 P. Will. Rep. 397.

Devise to *A.* and to his issue (*A.* dying in the life of the devisor) is void, and his issue can take nothing; and a remainder limited to the right heirs of *A.* is void also. *Vide* Salk. 238. Lat. 137. 2 Sid. 53, 78. 2 Mod. 313. But a devise to *A.* and *B.* and their heirs (*A.* dying before the devisor) is a good devise of the whole to *B.* in fee. Carter 2. Salk. 238. Show. 91. Cas. in Chan. 121.

UPON not guilty in ejectment on the demise of *Richard Wood*, the jury find this special verdict.

That *John Wood* being seised in fee of the premisses in question [illegible] will in writing 28 *July*, 8 *W.* 3. 1696. devised the [illegible] *Edward Bazill* for life, and after his decease t[illegible] body; and in default of such issue, to his two [illegible] *Susanna Wright*, and to the issue of their t[illegible] lawfully to be begotten; and for want of such issue, t[illegible] *Edward Bazill* for ever. That *Edward* a[illegible] (two of the devisees) died in the life of the devisor [illegible] issue, and that *Susanna* also died in the life of the te[illegible] leaving one daughter *Margaret* the now defendant, who is also heir at law to *Edward Bazill*, and born 10 *October* 1702. That afterwards the testator died, and the defendant entered, upon whom *Richard Wood* the lessor of the plaintiff as heir at law to the devisor entered, and made the lease to the plaintiff, *&c.*

Branthwayt Serjeant *pro quer'* argued, That the devise to *Susanna* is void by her death in the life-time of the testator. For every will must be construed as an instrument whereby the land must be conveyed, and then such a construction must be made upon the will, as would be made upon a deed; except in this particular point, that the party may not be forced to use such particular formal words, as must be made use of in a deed, (so that the words be sufficient to shew the intent of the devisor), because the law supposes a will to be made by one *inops consilii*; but however that intent must follow the rules of the common law. It is a general rule, which holds as well in the case of wills as of conveyances at common law, that by necessity there must be a donee *in esse* of capacity to take the thing given at the time when it ought to vest; and if there be no such person *in esse*, the gift is void. In this case there is no person capable to take the land, the devisee dying in the life-time of the testator, at which time nothing passed.

It may be objected that here are other words *issue of the body* which are *descriptio personae* that is to take. As to that objection, those words *issue of the body*, are only named as words of limitation expressing the quantity of the estate which the devisee should take, and are not named to be immediate takers; for

for if ſo, other perſons will take the eſtate whom the deviſor neither knew nor intended ſhould take.

The making and commencement of every will muſt be conſidered, and not the conſummation, (the death of the teſtator) which is founded upon the commencement. At the making the will *Suſanna* had no iſſue; and therefore the teſtator could not intend, that the iſſue which ſhould be born after the making the will ſhould be a purchaſer. In *Brett* and *Rigden*'s caſe, *Plow.* 345. it was adjudged, that where a deviſe was to *Henry Brett* and his heirs, and *Henry* died in the life of the teſtator, the ſon and heir of *Henry* ſhould take nothing by the deviſe; and that lands purchaſed after the making of a will do not paſs by a deviſe of all his lands, becauſe the law reſpects the commencement and intent of the deviſor. And as to an objection that may be made, that this caſe differs from *Brett* and *Rigden*'s caſe, this being an eſtate-tail, and that a limitation in fee; *Hartop*'s caſe, *Cro. El.* 243. was a deviſe to *Thomas Hartop* and the heirs males of his body, with remainders over; *Thomas* died, leaving iſſue in the life of the deviſor; and there it was held, that the eſtate cannot veſt in the heir, becauſe it never veſted in the anceſtor; for the word *heirs* was a word of limitation, and not to give an immediate eſtate; for if it was to veſt in him, it muſt veſt in him as a purchaſor, and that was not the intent of the deviſor; which caſe was then held not to differ from *Brett* and *Rigden*'s caſe, *Cro. El.* 422. *Raymond* 408. 2 *Lev.* 243. 2 *Jones* 135. *Pollexfen* 546. Wherefore the deviſe being void, he prayed judgment for the plaintiff.

Reeve contra. That the word *iſſue* is a good word of purchaſe, either of a preſent eſtate, or of an eſtate by way of remainder; and not a word of limitation in a deed or conveyance at common law. And if ſo, it ſhall be the ſame in the caſe of a will, unleſs ſome certain intention of the deviſor may be found in the will to alter the ſame. And therefore he argued, That the defendant might take either as jointenant for life with her mother and her aunt, and ſhe being the ſurvivor will have a good title; for if *A.* deviſe to *B.* and to his iſſue, and *B.* has no iſſue at the time, *B.* has an eſtate-tail; becauſe the intent of the deviſor was, that the iſſue ſhould take; and therefore whenever it is demanded what eſtate ſuch a deviſee has, it depends upon the circumſtances of the family, whether the deviſee has iſſue at the time of the deviſe or no. The deviſee is not of neceſſity to be *in eſſe* at the time of the deviſe, therefore a deviſe to an infant *en ventre ſa mere*, is good. So a deviſe to *B.* his eldeſt ſon for life, and after to the eldeſt iſſue male of *C.* for life, is good, though *C.* had no iſſue at the time of the deviſe and death of the deviſor, 1 *Rol. Abr.* 612. *pl.* 3. Limitations of uſes have been coupled

coupled in the same construction as has been made on wills; therefore if a man make a feoffment in fee to the use of himself for life, and of such wife as he should afterwards marry for her life, and after he takes a wife; they are jointenants, and yet they come to their estates at several times. *Moor* 96. 1 *Inst.* 188. *a.* But he did not insist much on this point, it being adjudged contrary in *Wild*'s Case, 6 *Co.* 16. The reason of the judgment in *Brett* and *Rigden*'s case, "That lands purchased "after the making of the will do not pass by a devise of all his "lands," depends upon the words of the statutes 32 and 34 *Hen.* 8. "*that every person having lands, may devise them.*" So that if the devisor has not the lands at the time of the devise, it is out of the words of the statute, and *all* his lands, is no more than all he then had. *Pollexf.* 549. (Except there be a republication after the purchase. *Salk.* 237. *Pollexf.* 548. 1 *Vent.* 341.) Plow. 344. b. 3 Co. 30. b.

Secondly, The defendant may take by way of remainder for life. And for that *Wild*'s case, 6 *Co.* 16. is strong in point, for there it is adjudged, that by a devise to a *baron* and *feme*, and after their decease to their children, they having children at the time of their devise, the *baron* and *feme* take but an estate for life, with a remainder to their children; and that a devise to *B.* and to his children or issue, he having no children at that time, is an estate-tail; the devisor intending that the issue shall take; and as immediate devisees they cannot take, not being *in rerum naturâ*; and by way of remainder they cannot take, for the gift was immediate to them and to their use; by which case it is proved, that if the gift is not immediate, as it is not in the case at bar, there being future words, "*and to their issue lawfully begotten*," the defendant may take by way of remainder for life. But he would not insist much on this point, it having been settled, that by a devise to *B.* for life, and after his decease to the issue of his body lawfully to be begotten, *B.* took an estate-tail, and not an estate for life only, with a remainder to his issue. *King* v. *Melling*, 2 *Lev.* 58. 3 *Keb.* 42. 1 *Vent.* 214, 225. *Pollexf.* 104. 1 *Sid.* 47. *Carter* 171. *Secus* in a deed, *Pollexf.* 583. where an estate is limited to *A.* for life, remainder to his first son in tail; for there *A.* is only tenant for life, and the son takes by purchase.

Thirdly, The defendant has a good title as issue of the body, though the devisee died in the life of the devisor, admitting the devise creates an estate tail. This point has never yet been settled, for the case of *Brett* v. *Rigden* was of a devise in fee, which differs from a devise in tail. *Hartop*'s case was adjudged on another point, and in the case of *Fuller* v. *Fuller*, *More* 353. the court was divided; and *Popham* said, that by a devise to *B.* and the

the heirs of his body, if *B.* was dead at the time of the devise, the heir should take as a purchasor. If a man has issue three sons, and devises his land to the eldest in tail, remainder to the second in tail, &c. if the eldest dies (having issue) in his father's life-time, his issue shall have it, because peradventure the devisor did not know of the death of his son, who perhaps was beyond sea, or otherwise absent. The statute *de donis* takes more care of the issue in tail, than of the tenant in tail himself, *quod voluntas donatoris in chartâ suâ manifestè expressa de caetero observetur.* There has not been one judgment whereby this point has been settled.

Fourthly, Which he chiefly relied on, admitting this to be an estate-tail, and the same construction ought to be made on this estate, as upon an estate in fee; the defendant has a good title, being found heir at law to *Edward Bazin*, by virtue of the remainder limited to the right heirs of *Edward*; which limitation is valid in law, though the first devise in tail should be void by the death of the devisee in the life of the testator, for the intervening estate limited to *Margaret* and *Susanna* prevents the consolidation of the two estates of *Edward*; for the estate limited to the right heirs of *Edward* is a distinct estate, independant on the estate-tail before devised to *Edward. Litt.* §. 578. If a lease for life be made, remainder to another in tail, remainder over to the right heirs of the tenant for life, the tenant for life may grant over the same remainder to another by deed. This limitation to the right heirs of *Edward* is a new created estate, and does not depend on the other estate, for those words, *right heirs*, are in this case words of purchase, and not words of limitation.

It may be objected, that it is a rule in law, "That when the "ancestor by any gift or conveyance takes an estate of freehold, "and after an estate is thereby limited mediately or immediately "to his heirs in fee or in tail, that always in such case *his heirs* are "words of limitation of the estate, and not words of purchase:" "To that objection he insisted, that this rule of law extends only to such cases, where the ancestor takes the estate limited to him; so that if the ancestor never takes the estate, that rule can have no force. And in this case *Edward* never took any estate, and then the defendant as heir at law to him shall take the estate as a purchasor. That the reason of that rule depends upon a supposition that the ancestor takes the estate, is proved by 1 *Inst.* 22. *b.* 319. *b.* 376. *b.* 1 *Co.* 104. *a. Shelly*'s case. 11 *H.* 7. 74. *per Hankford.* And therefore, if the devise to *Edward* and to his issue be void by his death without issue in the life of the testator, yet the remainder to the right heirs is good, being a distinct remainder: and no case proves, that a good remainder shall be tacked to a

Vide 1 Inst. 298. a.

a void devise, so as to avoid the remainder; wherefore he prayed judgment for the defendant.

Branthwayte replied, *First*, That the defendant is found not to be *in esse* at the making of the devise, and therefore she cannot take as jointenant; for all jointenants must be *in esse*, when the estate should vest. Were they to take as jointenants, they could only take an estate for life, which construction would overthrow the intent of the devisor, which it is plain was to pass an inheritance. It is a constant rule, that a devise to one and to his issue in a will creates an estate-tail, without considering the circumstances of the family at the time of the devise, whether the devisee had then issue or not; though the word *heirs* may be necessary in a deed; so is *Wild*'s case, and that case cited by my lord *Coke* out of *Bendloe*, is expressly against the opinion for which it was cited.

Secondly, That the defendant shall not take by way of remainder the same answer proves, for then they would take only estates for life, when the devisor intended a fee-tail. 3 Lev. 408.

Thirdly, The devise is void by the death of the devisee in the life of the testator, for the issue cannot take as claiming from one who was never seised; the issue in tail does not claim *per formam doni* by virtue of the statute *de donis* only, but also by descent from the donee in tail.

Fourthly, The heir cannot take it as a purchaser, for on a limitation to one and to his heirs, the construction has always been, that the heir shall never take as a purchaser, without that distinction, when the ancestor takes the estate, and when not.

C. J. Had it been limited to *Edward Bazill* only for life, remainder to another for life, remainder to his right heirs; this remainder in fee must have vested in *Edward*, drowning the first estate for life, and making his heir to claim by descent. *Wild*'s case is very oddly reported, and has mistook the judgment of that case cited out of *Bendloe* as it is reported in *Bendloe*, and in 1 *Anderson* 43. *pl.* 110. Where an estate is limited to one and his issue, it amounts only to a description of that issue, for *issue* is more properly a word of description, than of limitation. There can be no question but that by this devise to *Edward* and to his issue he has an estate-tail, because it is limited over, *and for want of such issue then to another*. A devise to one and to his issue, is not restrained to the first son, but extends to all the issue *in infinitum* (for *issue* is *nomen collectivum)* descending from the devisee. I can see no colour of difference between an estate-tail and a fee-simple, and I believe

Cro. El. 423. believe the report of that said by *Popham* in *Cro. Eliz.* is mistook. The statute *de donis* has nothing to do in this case, because the tenant in tail never took the estate. He that takes by purchase must take at the time when the estate should vest. The defendant cannot take by descent, because the ancestor never took it.

Powys, J. *Litt.* §. 578. makes strong against the defendant; for if the estate limited to the right heirs of *Edward Bazill* by the intervening estate-tail is distinct, and may be granted over by *Edward Bazill*; that proves, that *heirs* was meant only as a word of limitation, and not as a word of purchase, for else it could not be granted over by *Edward*, preserving his first estate. And the reason why it may be granted over is, because in judgment of law every man carries his heirs in his body.

Pratt, J. differed from the C. J. and conceived, that there was a difference between an estate-tail and in fee. The case of *Brett* v. *Rigden* must be allowed for law, that the devise by the death of the devisee, living the testator, is void; and the reason is, because the devisor had no intent in the devise to benefit any person but the devisee, for he did not know who would be heir at law to the devisee. A man has power by the statute to devise his lands, but he cannot raise such an estate as is inconsistent with the rules of law. When a man gives his lands to one and to the heirs of his body, it is plain that the devisor designed to benefit, not only the devisee, but also the issue of his body, thereby altering the common course of descent; therefore it is provided by the statute *de donis*, *quod donatoris voluntas*, &c. giving a benefit to the issue in tail, thereby intending to perpetuate the estate in his own name, and so intending a benefit to himself after his death. The issue are intended to have a benefit, though they were not *in esse* at the time of the devise, for the intent of the devisor was, 1*st*, For the devisee to take it; 2*dly*, His issue, not considering how they should take; and then though the first devisee cannot take it, dying in the life of the testator, yet so far as the will can take effect (which it may do in the issue) it must take effect. If it is limited to one man, remainder to another, though the first limitation be frustrated by the death of the party, yet the other remainder is good. Devise to an infant *en ventre sa mere* is good, by way of an executory devise; tho' the child is not born in the life of the testator: if the child is born, it is good by way of an immediate devise. Though a will cannot take effect *in omnibus*, yet as far as it can it must take effect. *Issue* is more properly a word of purchase than a word of limitation.

Upon this an *ulterius concilium* was granted, and the cause argued a second time, and this term *Parker* C. J. delivered the resolution of the court.

C. J. The question is singly, whether the devise be subsisting, or not? If it be subsisting, the title is with the defendant; if not, with the plaintiff. Resolution of the court.

The case of *Brett* v. *Rigden* must be allowed to be good law; in which case it is resolved, that there must of necessity be a grantee or donee *in esse* capable to take, when the estate ought to vest, and that a devise to *Henry Brett* and his heirs (*Henry* dying in the life of the testator) could not take effect in the heir; and *heirs* in that case were only named to create an estate in fee in *Henry*, and not to make the heir take immediately by purchase, but mediately by descent, and by *Henry*'s death the estate fell as much with respect to the heirs as himself.

The case at bar has been distinguished from that in two particulars.

1. That the devise to *Edward Bazill* and his heirs is not an immediate devise, by reason of the intervening estate.

2. That a devise to *Susanna Wright* and her issue, is different from a devise to her and her heirs.

First, We are all of opinion that the intervening estate makes no difference. *His heirs* are words of limitation, and therefore like the case of *Brett* v. *Rigden*; the only difference is in the thing devised, one being an estate in possession, and the other a remainder. *Litt.* §. 578. 1 *Inst.* 319. *b.* In this case the ancestor never took the estate, which he ought to have done, to make it vest in him in remainder. *Shelly*'s case, 1 *Co.* 93.

Secondly, If *Susanna* had survived, she would have had an estate tail; the words *issue of the body* create an estate-tail in her, and are as good an expression for an estate-tail, as the word *heirs* of an estate in fee. *Issue of the body* being therefore words of limitation, the devise of the estate-tail is void by the death of *Susanna* in the life of the devisor. The difference as to this between an estate in fee and in tail is not material, for if I devise one estate to *A.* and his heirs, and another to *B.* and the heirs of his body, it is in the power of *B.* to make this last estate as large as the devise to *A.* in fee.

It

It will be of dangerous consequence to alter resolutions in these cases, it is removing the antient land-marks; and the authority of *Brett* and *Rigden*'s case is not to be contested, which is not materially variant from this. But admitting it to be so, yet *Hartop*'s case, *Cro. Eliz.* 243. was of a devise in tail, and there it was held, that the devisee dying in the life of the devisor, the devise could not take effect in the issue; and in the case of *Fuller* v. *Fuller*, *Cro. Eliz.* 423. all the Judges agreed with the resolution in *Hartop*'s case, although *primâ facie* it may seem as if *Fenner* and *Popham* were *contra* to *Gawdy* and *Clench*; yet upon nice observation it will be found, that they differed only with respect to the new publication, and not to the other point. *Popham* puts this case: If a man has issue three sons, and devises the land to his eldest in tail, remainder to the second in tail, remainder to the third in fee, and the eldest dies having issue in the life of his father, his issue shall have it without a new publication. But the reason is, because the heir of the eldest son was also heir at law to the devisor, and no intent appeared to disinherit any of his sons: And *Popham* said it might be otherwise on a devise to a stranger (which is the case at bar).

If the devisor had died immediately after making his will, the effect would have answered the intent; for then the word *issue* would have been a word of limitation in all the estates, and if that were the sense at the time of making the will, it shall be taken to be so still.

It was objected, that this is an estate-tail raised rather by operation of law than the intent of the party. (Answer) The law takes that to be his intent, for upon a devise to *A.* and to his issue, or after *A.*'s death to his issue, the law has always construed this to be an estate-tail. If *A.* has two sons and four daughters, and dies before the devisor, the eldest son instead of having the whole would have but a sixth part, if it should be construed that the issue should take by way of remainder; whereas the intent of the devisor was, that the eldest son should have the whole during his life, which is a plain demonstration that the law takes such a devise to be an estate-tail. 1 *Ven.* 228.

The supposition of a kindness intended to the issue will be no argument in favour of the defendant, because it has been always thought that a devise to a man and his issue is a kindness to him, for by construction of law he carries his heirs in his own body. In this case the remainder man is more considered by the devisor than the issue in tail. The devise was for

for the ſake of the father, that he made it ſo large, and for the ſake of him in remainder that he made it no larger. He cannot be ſuppoſed to have had any particular affection for the iſſue, there being none *in eſſe* at the time of the deviſe.

The plain uſe of the words was to give *Suſanna Wright* an eſtate-tail. If ſhe had lived ſhe would have enjoyed it, but by her death the eſtate is determined. There is no difference between an eſtate in fee and in tail, for in both Caſes the Deviſee muſt be *in eſſe*.

The ſame anſwer ſerves for the remainder to the right heirs of *Edward Bazill*, who never took the eſtate, and therefore could not convey a deſcent to his heirs.

There is no inconvenience in putting the deviſor in theſe caſes to review his will; and the caſes of *Brett* v. *Rigden*, and *Hartop*'s caſe, are founded upon good reaſon and authority, and are not now to be over-ruled.

Judicium pro querente.

The defendant immediately delivered into court a writ of error *coram vobis*, and the court demanding of her attorney what error he had to aſſign, he told them infancy in the defendant, who had appeared by attorney, as error in fact.

C. J. The defendant ought not to be allowed to aſſign this error in ejectment, for he comes in of his own accord, and prays to be made defendant, which the plaintiff cannot oppoſe. This is an abuſe upon the court, and the attorney ought to be committed.

Infancy in defendant in ejectment and appearance by attorney ought not to be aſſigned for error.

Whereupon the attorney withdrew his writ of error, and the court gave him a fortnight to bring error in the Exchequer Chamber, upon the matter of law, and in the mean time execution to ſtay, and directed the record here to be amended, and the defendant made to appear by guardian.

Dominus Rex *verſus* Powell & al'.

RULE for the proſecutor of an information *in natura de quo warranto*, to pay coſts for not going on to trial, was moved to be diſcharged. *Sed per Curiam*, In the caſe of the King there can be no *laches*; but a ſubject in theſe proſecutions ſhall pay coſts as in common actions. Executors and adminiſtrators pay coſts for not going on to trial. Rule to pay coſts.

Proſecutor of information in nature of *quo warranto* ſhall pay coſts, 9 Ann. c. 20.

Cork *versus* Baker. In C. B.

Intr. Trin. 11 Geo. rot. 1483.

Statute of Frauds and Perjuries extends only to contracts in consideration of marriage, and not contracts to marry.
Ld. Raym. 387.
2 Eq. Abr. 248.
Tri. at Ni. Pri. 264.

THE plaintiff declares, that in consideration she promised to marry the defendant, he promised to marry her at his father's death, who is since dead, but the defendant refused so to do, and has since married *A. B.* which she lays to her damage 1000 *l.* and upon *non assumpsit* obtained a verdict for 300 *l.*

The defendant moved in arrest of judgment, that this *parol* promise is not good in law. But after argument it was held, that this is not within the statute of frauds and perjuries, which relates only to contracts in consideration of marriage; and that the case in 3 *Lev.* 65. has been contradicted by later resolutions. The defendant having married another person, has disabled himself to perform the promise, and therefore the plaintiff cannot apply to the spiritual court to have a performance decreed, but must be repaid in damages here.

Judicium pro querente.

Godfrey *versus* Norris. At Guildhall.

The witness being administrator *de bonis non* of the obligee, proof of the hand was allowed.
12 Vin. Abr. 223. pl. 8.

DEBT upon a bond, *Non est factum* pleaded, and issue thereupon.

The plaintiff was administrator *de bonis non* of the obligee, and the only surviving witness to the bond; and the proof given upon this issue was only a person who swore to the hand-writing, and also several letters from the obligor making mention of this bond.

To this it was objected by the other side, that the hand-writing is not sufficient proof, where the witness is living. That it was the fault of the plaintiff to bring himself under this incapacity; he might have let another person have taken administration for his use, or administration *quoad* this bond only.

But it was ruled *per Parker* C. J. that this was good evidence; and he likened it to the case of a will, where the witness afterwards happens to be a devisee under the will, in which case if there be no other witness, proof of the hand is allowed.

Whereupon the plaintiff obtained a verdict.

Lockart

Lockart *versus* Graham.

Coram King C. J. de C. B. *at* nisi prius.

WHERE there were three obligors, and the action brought against one of them only, the other obligor was allowed to be a witness to prove the execution of the bond by the defendant; after a case had been made of it at *nisi prius*, and conference with *Tracy* and *Dormer*, Justices.

One obligor witness to prove the delivery by the other.

Sacheverell *versus* Sacheverell.

At Serjeants Inn in Chancery-Lane, *before a court of Delegates*, 5 March 1716.

THE marriage of the plaintiff came in question after her husband's death upon granting administration, and it appeared they were married under feigned names at the *Fleet*. The widow produced an *affidavit* of the intestate's, made by him before a surrogate of *Doctors Commons*, that he was married to her; which affidavit agreed with the register, and referred to it. But it was objected, that the taking this *affidavit* was an extrajudicial act, there being nothing at that time before the ecclesiastical court; but the court here allowed it to be read in confirmation of other evidence. And the appeal was dismissed with 100*l.* costs, and the marriage confirmed.

Affidavit of a dead man read to prove his marriage tho' taken before a surrogate, no cause being in court.
1 Will. Rep. 675.

Brown *versus* Barkham. In Canc.

SIR *Edward Barkham* having no issue of his own, and only one sister, and two cousins, *Robert* and *Edward Barkham*, 19 *Jan.* 1709, made his will, and devised the lands in question to trustees and their heirs, "in trust to sell sufficient to pay my "debts, and to convey the residue to my cousin *Robert Barkham* "and the heirs males of his body, and in default of such issue "to the heirs males of the body of my great grandfather Sir "*Robert Markham*, remainder to my own right heirs for ever." Then he gives the interest of 2000*l.* to his sister for her life, and the principal to her children after her death.

On a devise to the heirs males of the body of *A.* one who is heir male and not heir general shall nevertheless take by purchase.
See 14 Vin. Abr. 254 to 257.
5 Bur. Rep. 2625, 2626.

Robert the first devisee died without issue in the life of the devisor, then the testator died, leaving a sister, who is heir gene-

 ral

ral to Sir *Robert* the great grandfather; but the defendant *Edward Barkham* is heir male of the body of the great grandfather.

The queſtion was, to whom the truſtees ſhould convey the ſurplus, whether to the ſiſter, as heir general of the deviſor, or to the defendant as heir male of the body of Sir *Robert* the great grandfather, remainder to the right heirs of the deviſor.

This caſe was argued very largely at the bar. And *Cowper* Lord Chancellor took time to conſider of it, and this term pronounced his decree.

Lord Chancellor. If the manifeſt intent of the teſtator, expounded by natural reaſon, without regard to legal reſolutions, were to govern in this caſe; I ſhould think it would hardly admit of a queſtion. But ſince there is an artificial reaſon in the law, which ſometimes ſtands as oppoſed to natural (which is right) reaſon, and is founded upon the opinions and reſolutions of Judges, and that taken and allowed to be law; the courts both of law and equity ought to ſubmit to them, when they are fully examined and found to be thus ſettled; becauſe otherwiſe the law would be an uncertain undetermined rule, and lawyers would not know how to adviſe their clients. I ſhall therefore inquire how far this court is hindred in the preſent caſe by the fixed rules of law, from purſuing the plain intent of the teſtator, which was no doubt that the conveyance ſhould be made to the heirs males of the body of Sir *Robert* the great grandfather, and not to a female, who is heir general to himſelf, as long as there are any heirs males of the body of the great grandfather.

First objection. The firſt objection inſiſted on was, that it has been often adjudged, that he who takes as a purchaſer by the words *heir of J. S.* immediately, muſt be compleatly heir of *J. S.* and that no perſon can take as heir whilſt his anceſtor lives.

I anſwer, That this maxim, and the caſes founded upon it, are very foreign to the preſent queſtion; one main ground of the reſolution founded on this rule is, that the term *heir* in a legal ſenſe denoting the perſon who is to take after the death of an anceſtor, cannot be uſed as a proper deſcription of a perſon whoſe anceſtor is living, for the terms of the deſcription are not then verified. But in this caſe they are compleatly verified; the anceſtor is dead, and the perſon who aſks the conveyance, is heir male of his body, and as ſuch he is allowed by all to be capable to take by deſcent: But they ſay not by purchaſe. What grounds there are for that diſtinction will be conſidered hereafter;

after; at present I ſhall only obſerve, that *Edward Barkham* having all parts of the deſcription verified in him, his caſe is different from that of *Chaloner* v. *Bowyer*, 2 *Leon.* 70. where a deviſe was to the youngeſt ſon for life, remainder to the heirs of the body of the eldeſt, the youngeſt died in the life of the eldeſt, and the ſon of the eldeſt could not take. Why? becauſe he anſwered neither part of the deſcription, for he was neither heir, nor heir of the body of his father, while he was living; and this objection will hold in many other caſes.

The ſecond objection, which ſeems to ſtand in the way of natural reaſon, is, that there are caſes in which it is held, that none can purchaſe by the words *heir male of the body of J. S.* unleſs he be heir general as well as heir male. Second objection.

I have met with but few caſes which can be urged with any colour of reaſon for the proof of this aſſertion; one is that of *Counden* v. *Clerk*, *Hob.* 31. in which it is ſaid, that when the limitation is made to the heirs male or female of the body, they that will take muſt have both words verified in them, (that is) they muſt be both heirs, and alſo heirs male or female; and he gives this reaſon for it, that this is clearly without the letter and intent of the ſtatute of *Weſtm.* 2.

In anſwer to the authority of this caſe,

1. I obſerve, that this was not the point then in queſtion, but only an opinion of *Hobart*'s, declared incidentally in the argument of the caſe, and therefore ought to have the leſs weight.

2. The reaſon that is given for it is by no means ſatisfactory, or a good one; for the ſtatute *Weſtm.* 2. is no ways pertinent to the queſtion. The whole effect of that ſtatute is, to prevent the alienation of eſtates which before were conſidered at common law as fee-ſimples conditional, and alienable after iſſue had; and how this is applicable to the queſtion concerning the deſcription of a purchaſer, and whether certain words will be ſufficient for that, I cannot imagine. The ſtatute only governs eſtates when they are veſted, but meddles not with the deſcriptions that are neceſſary to paſs thoſe eſtates. The words *heir male of the body of* J. S. were certain and known words of purchaſe at common law, and need not the aid of the ſtatute to make them ſo.

3. By what *Hobart* ſays afterwards in the ſame caſe, it may well be concluded, that had it been the point in judgment, he would have been of opinion, that a man might take by the deſcription of the heir male of the body of *J. S.* though he is

 not

not heir general, but a female is : For he takes notice that the case then in queſtion, the *heirs males* were not reſtrai to any body, which (ſays he) might have had ſome colou help from the ſtatute *de donis*. This great man could not over his own aſſertion which he made before, without ſome morſe of judgment, if it was his aſſertion ; but I rather t the words *of the body* to have been added by an unſkilful tr ſcriber of the copy. So that upon the whole I think, that of *Counden* v. *Clerk* of very little weight in the preſent queſti but the point there adjudged is doubtleſs good law.

See Hargr. Co. Littl. 24. b. Another caſe urged for the plaintiff is *Shelley*'s caſe, 1 *Co* 1 which is tranſcribed into his *Co. Litt.* 24. *b.* This is in an authority (ſuch as it is) in point, that one cannot tak a purchaſer by the words *heir male of the body of J. S.* ur he be heir, as well as heir male. But in anſwer to th obſerve,

1. That this point was not adjudged in *Shelley*'s caſe; only the argument of counſel, which the court in delive their opinion took no notice of.

2. The authorities in the margin of *Co. Litt.* which are to ſupport this caſe, are moſt of them very little to the poſe, and do by no means prove it. That of *Huſſey* in *Bro Done* 42. makes rather againſt this poſition ; and that of 374. *a.* is only a ſhort ſketch of *Shelley*'s caſe, and the le be regarded, becauſe it differs from the elaborate report of caſe by *Coke*.

Having thus far cleared the preſent queſtion from theſe great authorities ; there remains only one other, whi ſhould not think very material to be taken notice of, had the counſel for the plaintiff thought it of ſo great momen to deſire a rehearing upon the diſcovery of it. It is the ca *Starling* in this court, 8 *W.* 3. and was thus : *A.* deviſed to *J. S.* for life, and then to truſtees, in truſt to convey to the next heir male of the teſtator. And it was decreed, the truſtees could not convey to the next male relation, cauſe he was not heir, which was certainly right, and the point reſolved in the caſe of *Counden* v. *Clerk*, and in th *Aſhenhurſt*, which is cited in it ; and the reaſon is, tha words *heir male* are not a ſufficient deſcription without add *the body*, and they are not anſwered, unleſs the perſon be heir and male ; nor are they ſufficient to paſs an eſtat deſcent, any more than by purchaſe. Indeed in caſe of a the words *of the body* are ſupplied, ſo as to make it an e tail, in the perſon that takes it ; but then the perſon that take it muſt be heir as well as male.

Having now gone through all the cases that were urged for the plaintiff, which I believe are all that could be urged; and it appears to me that many of the points in them are not pertinent to the present question, and those that were, *gratis dicta*, and the arguments of counsel, without grounds either from reason or former authorities to support them; I shall now proceed to shew, that a man may take by limitation, or purchase, as heir male of the body of *J. S.* though he be not heir general, and that for these reasons.

1. The law allows a man to purchase by a sufficient description, though neither his Christian or surname be part of it, and that the words *heir male of the body of J. S.* are a sufficient description of that particular heir, though he be not heir general.

2. The judicial authorities that a man may take as a purchaser by the words *heir male of the body of J. S.* without being heir general, greatly over-balance those that hold the contrary.

First, As to the first point, it is so certain a principle in law, that a man may purchase by other descriptions as well by his name, that it has been adjudged the words *abbot or bishop* of a certain place, would be a good description, though the name of the person be mistaken. *Co. Lit.* 3. *a.* But to make a good description there are three things requisite, all which concur in the present case.

1. It must be true; it is true, that *Edward Barkham* is heir male of the body of the testator's great-grandfather, which is manifest, because otherwise he could not take an estate by descent as such, in case the great-grandfather had been seised of it to himself and the heirs males of his body, which all allow he would; and why he may not by purchase I cannot conceive, for the description is as true in the case of a purchase as a descent, and why should it not then be good as well in the one as the other. They say the statute *de donis* aids in the case of descent, but not in purchase; but I have already shewn that the statute does not at all relate to this point, for it meddles not with the descriptions that are to pass estates; and therefore if *heir male of the body of J. S.* be not a sufficient description, that special heir could not have any aid from the statute, and if it be a sufficient description, he does not want the aid of it. And the present case is the stronger, because the great-grandfather was dead at the time of the devise; so that the maxim *quod non est heres viventis* is not in the way, but all the words are immediately verified at the time of the devise. It is said indeed, they are not, because the male is not heir in this case; but the very stating of this matter will

expoſe it as contrary to common ſenſe and reaſon; for it is manifeſt the teſtator intended, that his heir general ſhould not have theſe lands, unleſs he was a male alſo, and therefore he adds thoſe words to reſtrain the general ſenſe of the word *heir*, and to confine it to a ſpecial heir. If lands of the nature of *Borough Engliſh* at common law be deviſed to my heir according to the cuſtom of *Borough Engliſh*, by this the teſtator muſt mean, his youngeſt ſon ſhould take. But to prevent the taking in this caſe they would have you ſtop at the word *heir*, and then this ſpecial heir cannot take; but if you take all the words together then he may, for the words the teſtator has uſed are plain, certain, and well known in law, to deſcribe the perſon the teſtator manifeſtly intended ſhould take by them.

2. The ſecond thing requiſite to make a perfect deſcription is, that it be certain, and applicable to the thing deſcribed and no other. And this is ſo in the preſent caſe, for *Edward Barkham* is heir male of the body of the teſtator's great-grandfather, and no other perſon is ſo.

3. The third requiſite is, that it be expreſſed in proper words. This is not always neceſſary in a will, but here they are proper even in the caſe of a will, for the words *heirs male of the body* are the proper and indeed the only words that can be uſed, to diſtinguiſh that ſpecial heir, from the general heir. Sometimes the word *right* is uſed with *heirs*, but improperly in caſes of this nature.

Thus you ſee all the things requiſite to make a perfect, certain deſcription, concur in this caſe; and therefore ſince it has been proved, and indeed cannot be denied, but that a man may take by any other good deſcription as well as by name, it evidently follows that he may take by this.

Secondly, I come now to ſhew that the judicial authorities that a man may take as a purchaſer by the words *heirs male of the body of J. S.* though he be not heir general, do greatly overbalance thoſe that hold the contrary.

Vide Salk. 679. Sir T. Jones 90. 1 Ventr. 334. 2 Lev. 232. Raym. 330. 3 Keb. 830.

The firſt caſe I ſhall mention is that of *Burkett* v. *Durdant*, 2 *Ven.* 311. which was adjudged in the houſe of lords; and the caſe of *James* v. *Richardſon* in *Pollexfen* 457. is the ſame. The caſe was thus: A man deviſed lands to *A.* for life, remainder to the heirs males of the body of *A.* now living, and for want of ſuch iſſue remainder over; and it was reſolved, that there paſſed an eſtate for life only to *A.* and that the remainder immediately veſted in the heir male of the body of *A.* then living; becauſe thoſe words were a ſufficient *deſignatio perſonæ*,

fenat, who was intended to take; and this is a ftronger cafe than the prefent, becaufe the anceftor being alive, he could not ftrictly fpeaking have any heir; but thofe words being ufed in common parlance to denote the perfon who would take as heir male, if the anceftor were dead, that was thought fufficient. As for the words *now living*, I do not think they were very confiderable in that cafe, for they only fhew that the teftator intended, that fome body who was then alive fhould take.

The cafe of *Long* v. *Beaumont*, which was decreed in the Houfe of Lords, *Paf.* 13 *Ann.* has not thefe words *now living*, and yet *heir male of my aunt Long*, was adjudged a good defcription of the perfon that was to take, though the aunt was ftill living, and confequently he was neither heir nor heir male, nor was it certain he would be heir male of the body at the time of her death. 1 Will. Rep. 229.

The cafe of *Pybus* v. *Mitford* was thus: (1 *Ven.* 372.) *Mich. Mitford* was feifed of the lands in queftion, and had iffue *Robert* by his firft *venter*, and *Ralph* by *Jane* the fecond, and covenanted to ftand feifed to the ufe of his heirs males begotten of the body of his fecond wife; the queftion was, whether *Ralph* could take. The Judges, to fupport the intent of the party, raifed a fine-fpun notion of a refulting ufe, which indeed was very well laboured by them; but *Hale* in delivering his opinion infifts upon the point now in queftion, and argued very ftrongly and clearly, that the words *heirs male of the body of J. S.* are good words of purchafe; and puts the cafe of a gift to one and his heirs female of his body, and he has a fon and a daughter, the daughter fhall take. *Litt. fect.* 22. And by feveral other cafes there quoted, he fays it appears, that no regard is had whether the fon be heir of the hufband, if he be the heir of their two bodies; and then cites a cafe which was adjudged in Queen *Elizabeth*'s time, which feems directly to the prefent queftion: A man had three daughters and a nephew, and he gives 2000*l.* to his daughters, and his land to his heir male; provided, that if his daughters troubled his heir, then the devife of 2000*l.* to them fhould be void; and it was adjudged that the limitation to his brother's fon by the name of heir male was a good name of purchafe; and fays he, this agrees with *Counden* and *Clerk*'s cafe, in *Hobart*.

Thefe reafons and thefe authorities made fo ftrong an impreffion upon Juftice *Wild*, that he immediately declared himfelf convinced, and that he was of the fame opinion with *Hale*; and for my part, I think they are fufficient to fatisfy any reafonable man.

Trin. 8 *W.* 3. *in C. B. rot.* 1484. *Baker* v. *Wall. J. S.* by his will devifed his lands "to *Daniel* my eldeft fon, and to my "heirs

" heirs males for ever; and if my heir should be a female, my " said heir male shall pay my heir female 12 *l.* *per annum* out of " my lands, I mean my heir male, for ever." The testator died, and *Daniel* died, leaving issue one daughter only; and it was resolved, that *John* the brother of *Daniel* should take the estate by the description of heir male of the testator, though the words *of his body* were not in; but the testator's intent appearing so plain, that an heir female should not hinder the next heir male from taking, they gave judgment for the male.

S. C. 2 Vern. 729.

Upon the whole I am of opinion, that the words *heirs male of the body of his great grandfather* are good words of purchase, to pass the estate to him who is heir male, though not heir general, 1. Because common sense, natural reason and understanding, and the manifest intent of the testator, call aloud for this justice. 2. Because the legal authorities that are urged for the contrary opinion are of themselves but of very little weight. 3. Because the resolutions that have been in favour of this opinion, do greatly over-balance those of the other side.

The next inquiry is, how the trustees in this case shall execute their trust. And it must be observed, that though the testator directs the trustees, to convey the surplus to the heirs males, in the plural; yet that is well pursued by conveying to the heir male in the singular number, and to his heirs male; for so the legal sense of those words is, as was resolved in *Shelly*'s case. And it is most properly expressed in the plural number, because then the words denote both the person to take, and the estate to be taken. Let the conveyance be made to the person who is heir male of the body of the testator's great grandfather, and the heirs male of the body of the great grandfather. In this I follow the law, which executes conditions executory as near as may be, where the words cannot be strictly pursued; and a court of equity ought to execute trusts, as the courts of law do things executory.

Dominus Rex *versus* Hunt & al'.

Mandamus.

THE court granted a *mandamus* on 1 *Geo.* *c.* 34. directed to the justices of the peace, to allow the defendants, being constables, the extraordinary charges in providing carriages on the late expedition into *Scotland*.

Dominus

Dominus Rex versus Theed.

THE writ *de excommunicato capiendo* was in a suit *pro correctione morum* generally, and held to be ill on the authority of *Rex* v. *Gapp*, *Pas.* 1 *Geo.* which was *in quodam negotio pro reformatione et correctione morum*. Excommunicato capiendo may be superseded. Salk. 294. Mod. Ca. 58.

After the writ had been opened and entered of record, it was delivered out in order to take up the defendant; and before the return the defendant moved and had it superseded; for the court said, they could judge of it by the entry, and since it appeared, the defendant could not be legally detained upon it if he was taken, it was proper to supersede it, to prevent the man's being restrained of his liberty contrary to law: That the intent of 5 *Eliz.* *c.* 23. which directs the writ to be delivered in open court, was to apprize the court of the nature of the cause; that this was now to be considered as a writ that *improvide emanavit*, and they were not to wait till the return, till all the inconveniences which they should have prevented by not issuing the writ had happened. Lucas 350. S. C.

Dominus Rex versus Eyre.

A *Scire facias* was brought to repeal the grant of a market to the defendant, suggesting that it was to the prejudice of the Duke of *Rutland*, who had a market within four miles. *Scire facias*.

Upon trial it was found *pro Rege* on the issue whether the grant was to the prejudice of the Duke; and on motion in arrest of judgment it was held to be a good issue, though the grant and not the *user* was found to be prejudicial.

Then it was objected, that the *scire facias* was brought in the late Queen's time, and by her demise the proceedings abated, this not being within 1 *E.* 6. *c.* 7. or 1 *Ann.* *c.* 8. To which it was answered and resolved by the court, that this is an original writ, and therefore within the general words. *Regist.* 69.

Dominus

Dominus Rex *verſus* Hamond.

Communis ſtrata and *alta via* are ſynonymous. Lucas 382. cited in Andrews 243.

INdictment for that the defendant *tali die anno et loco* ten loads of ſtraw and dung *in communi ſtrata ſive alta regia via poſuit et locavit et ibidem per decem dies remanere permiſit*, *ita quod* the King's ſubjects could not paſs.

On demurrer it was objected, that the place where the nuſance was committed ſhould be certainly alledged, whereas here the indictment runs that it was laid in one place or another; and being disjoined by the *ſive*, the court cannot take *communis ſtrata*, and *alta regia via*, to be the ſame. 2 *Roll. Abr.* 80. *pl.* 4, 5.

To which it was anſwered and reſolved by the court, That *ſtrata* ſignifies the highway, and that theſe are two expreſſions to denote the ſame place. *Spelman verbo ſtrata*: *Cowell's Interpreter*, *Streetward* and *Streetgavel*. So in the ſtatute of *Marleberge*, which prohibits diſtreſſes in the highways, it is *Nulli liceat diſtrictiones facere in via regia aut in communi ſtrata*: In the gloſſary at the end of the *decem ſcriptores*, there is an account of ſome travellers who happened to loſe their way; and the expreſſion is, *a publicâ ſtratâ deviantes*, which muſt certainly mean the highway. The court therefore held it well enough.

Then exception was taken, that the *terminus a quo*, or *ad quem* the way led, was not mentioned. To which the court anſwered, that in indictments for nuſances in the highway it is not neceſſary; for the highway is infinite, and leads from ſea to ſea. *Latch.* 183. 3 *Keb.* 89. *Rex* v. *Thompſon*, 10 *W.* 3. There was judgment *pro Rege*.

Dominus Rex *verſus* Simpſon.

A deer-ſtealer may be convicted before appearance, if duly ſummoned. Seſſ. Caſ. 346. pl. 273. 10 Mod. 248. 341. 378. Gilb. Caſ. 282.

THE defendant was convicted upon the ſtatute 3 & 4 *W.* & *M.* for deer-ſtealing, and the conviction ſet forth, that he had been ſummoned to appear before the juſtices; but it did not appear he ever was before them.

Exception was taken to this by *Reeve*, that as no appeal lies in this caſe, the juſtices ſhould not have proceeded in the abſence of the party, eſpecially where it may end in a corporal puniſhment, as it may do here for want of a diſtreſs; and he cited *Salk.* 56, 400. and *Mawgridge*'s caſe in *Kelyng*. And at another day (on conſideration) *Parker* C. J. delivered the reſolution of the court.

We

We are all of opinion, the offender may be convicted, without appearing. The statute is silent as to the method of proceeding, and the law of *England*, it is true, in point of natural justice, always requires the party charged with any offence to be heard before he be condemned in judgment; but that rule must have this exception, unless it is through his own default: Were it otherwise, every criminal might avoid conviction. The law being so, the magistrate is bound to give some opportunity to the party to appear, and if upon such notice he neither comes nor sends a sufficient excuse, the magistrate may proceed to judgment. If this was not to be allowed, the consequence would be, that the offender would escape unpunished; because he would never appear purposely to be convicted, and that would be to make the execution of the law depend on the will of the offender. Salk. 181. 1 Mod. Ca. 41.

The rule of law that has been objected is true, That acts of parliament, in what they are silent, are best expounded according to the use and reason of the common law. In the case of high treason (which is a much harder case than this) the party may be outlawed for his not appearing, and then he is liable to all the pains and penalties, as much as in the case of a conviction. So in real actions if the tenant makes a second default, judgment peremptory is given for the demandant to recover. In crimes of a lesser nature than treason or felony, and in personal actions, the outlawry exposes the party to greater punishment than if he had appeared and been condemned in that action; for he forfeits thereby his liberty, goods and chattels, besides other disabilities which he incurs. In corporations if a member of the body be summoned, and do not appear, he may lawfully be removed. 1 *Ven.* 19. 2 *Keb.* 488. 1 *Sid.* 14. 2 *Sid.* 97.

It is the constant practice in this court, in setting aside judgments, granting attachments, *&c.* to give notice to the party to come and make his defence, and if he neglects to make his defence, the court proceeds against him.

This act of parliament plainly designed a summary proceeding, and therefore the proceedings must be guided according to the summary proceedings allowed in this court. The solemn proceedings of the law before a man shall lose his life or lands need not be followed; and yet in those cases the judgment is, that he shall forfeit his life or lands, not for the crime as taken *pro confesso*, but the judgment is really for his absence. The proceedings therefore against a man in his absence are not against the common law. Many acts of parliament that appoint a forfeiture or penalty, do not give the

justices power to bring the offender before them. There are many offences against acts of parliament, which are mere nonfeasances or neglects, as not putting out of lights, *&c.* Now to require the offender to be brought before the justices and detained, will be a strange construction, for that detainer may be accounted a greater punishment than the forfeiture; and if in such a case the offender, to prevent further trouble, would send the forfeiture, why should not that be a sufficient authority for the justice to convict him, though he does not appear in person? To compel the offender to appear would be to no purpose; for if he does appear, the justices cannot compel him to make a defence.

An objection was made to the summons, that it does not particularize the place and hour, it is only *licet summonitus fuit ad hoc tempus et hunc locum, sed defalt' fecit.* (Answer) The default entered by the justices implies the summons was to appear at that time and place, for otherwise it would not be a default; and where the legislature has given a power, we will presume the justices pursue that power, unless the contrary appears. If they did not make a proper summons, they are punishable for it by information. *Post, Rex* v. *Allington, Hil.* 12 *Geo.*

An attorney in these cases may be made to defend.

As for the other order of conviction, whereby it appears the defendant made an attorney to defend for him; we think that is certainly good, for the offender may intrust his defence with another, and the justices cannot enforce him to appear in person. Orders confirmed.

Brampton *and* Crabb.

After the inquest is taken by default, the defendant can make no suggestion on the roll.

AFTER a verdict for the plaintiff in an *indebitatus assumpsit*, and twenty-two shillings damages assessed, the defendant came into court, and suggested upon the roll "*quod* "*querens nulla misas et custagia versus ipsum in hoc casu super ve-* "*redictum illud recuperare debet, sed humillime petit idem defendens* "*quod misae et custagia sua per ipsum circa defensionem suam in hac* "*parte expensa per judicium hujus curiae juxta formam statuti sibi* "*adjudicentur, quia dicit quod,*" (setting out the act of 3 *Jac.* 1. *c.* 15. made for the recovery of small debts in the city of *London*, and which subjects the plaintiff to lose his costs, and pay costs, where the parties are citizens, and the damages under forty shillings). Then the defendant avers, that at the time of making the promises in the declaration, *et semper abinde hucusque*, he was and is a freeman of the city of *London*, residing within the city, (*viz.* in such a parish and ward) using the trade of a cooper, and that the plaintiff was and is a free-

man

man residing within the city, *viz.* &c. using the trade of a barber, and that the cause of action arose within the jurisdiction of the court of conscience, which was held every *Wednesday* and *Saturday* every week since the time of the promise. He likewise avers, that he was indebted to the plaintiff in no more than twenty-two shillings, and that he has expended so much in his defence; which the plaintiff ought to pay, *juxta formam statuti praed'*.

The first doubt upon this suggestion was, whether the defendant should not have made it before the cause had so far proceeded as to a verdict, and whether it was not a matter pleadable to the jurisdiction of the court: But upon citing a case of *Pennel* v. *Wallis, in B. R. Mich.* 9 *W.* 3. where, after verdict for thirty shillings, the defendant made such a suggestion, which was argued on demurrer, and held to be well suggested after a verdict, this first difficulty was got over.

But then it was objected, that it appeared the inquest was taken by default, and therefore the defendant was out of court as to all purposes but having judgment against him. After a default there can be no repleader: *Salk.* 216. 1 *Mod. Ca.* 1. *Salk.* 579. 2 *Roll. Abr.* 430. *pl.* 4.

For this last reason the court held, that the defendant could not be received to make the suggestion, and so the plaintiff had judgment.

Easter Term.

3 Georgii Regis. In B. R.

Thomas *Lord* Parker, *Chief Justice*.
Sir Littleton Powys, *Knt.* }
Sir Robert Eyre, *Knt.* } *Justices*.
Sir John Pratt, *Knt.* }
Sir Edward Northey, *Knt*. *Attorney General*.
Sir William Thompson, *Knt*. *Recorder of* London, *Solicitor General*.

Dominus Rex *versus* Barnes.

The sessions cannot set aside the assignment of an apprentice bound out by the justices. Sess. Cas. 114. pl. 110. Cas. Set. and Rem. 78. pl. 101. fol. 219.

A Is bound out by the justices to *B.* who assigns him to *C.* and the sessions, reciting the special matter, adjudge the assignment void, and order him to be returned to *B.*

Per Curiam: The sessions had no power to judge of the validity of a deed, or to hinder a man from assigning his apprentice. The covenant to provide for him is well performed, if the person to whom he is bound assigns him to another to provide for him. And apprentices bound out by justices may be assigned as well as others. Wherefore the order was quashed.

Freshwater

Freshwater *versus* Eaton.

SCIRE *facias* on a recognizance in the marshal's court, to surrender the principal to the gaoler of the palace court, if he should be condemned. Error of that judgment, and affirmance, and upon that the bail rendered the principal to the *King's Bench*, the whole proceedings being removed thither.

On a recognizance to render in an inferior court, if the proceedings are removed into B.R. the render may be there.

Whitaker Serjeant insisted, that this is no performance of the condition.

C. J. Upon the surrender to the marshal's court, *non constat* to the officer that there is any charge against him there, and by that means he will be discharged; and if he be surrendered there he must be removed to this court; it will therefore be least trouble, to surrender him here.

Eyre J. The render ought to be where it will be most effectual.

Pratt, J. A condition to re-enfeoff is performed by lease and release, *Co. Lit.* 207. *a.* 1 *Rol. Abr.* 426. *Carter* 88. *Plowd.* 7. *a.* 156. *b.* Condition to pay money is performed by causing it to be paid. The intent of the condition in this case is answered by the defendant's being in prison to answer the plaintiff's demand; and many cases of conditions there are, where the law has never required a strict performance according to the letter of the condition, provided the intent of the condition be answered.

Per Curiam: The render is good, and a good performance of the condition.

Dominus Rex *versus* Poland.

CHESHYRE Serjeant moved for treble costs against the prosecutor of an indictment against the defendant for using the trade of a glover, upon an affidavit that he was a soldier, and disbanded upon the peace of *Ryswicke*, by virtue of the statute 10 & 11 *W.* 3. *c.* 11. which enacts, "That the soldiers time "shall be taken as if actually served, and if they be indicted "they shall be acquitted on the general issue, and recover tre- "ble costs."

Where treble costs are to be recovered against a prosecutor for a matter not appearing on the *Postea*, the court will give leave to suggest the special matter.

Hill. 5 Geo. 2. in B. R. *Catheral* v. *Cooper & al'*, where defendants were sued as acting under the *Kensington* turnpike act 12 G. 1. c. 37. and acquitted, they were allowed to make the like suggestion.

The doubt in this case was, how these costs should be come at, whether by rule of court upon the *affidavit*, or by a suggestion of the matter upon the record; and for this purpose he quoted the case of *Walker* v. *Sir Philip Egerton*, *Hilary* 7 *W.* 3. There the defendant was collector of the land-tax, and the plaintiff being doubly taxed as a non-juror, and distrained, brought an *Indebitatus assumpsit* against the collector for the redemption-money. And though nothing of this appeared upon record, yet on affidavits of the fact the court directed a suggestion to be made, "*Quia constat curiae super examinationem quod, &c. ideo consideratum est* that the nonsuit be recorded, and the defendant recover treble costs.

Bateman v. *Wallis*, *Trin.* 9 *W.* 3. *in B. R. rot.* 588. That was an *Indebitatus assumpsit* for a cause arising in *Newcastle*, and a verdict under 40 *s.* The custom of *Newcastle* was suggested, that the plaintiff should not recover, but pay costs; and so was the case of *Brampton* v. *Crabb*, *Hil.* 3 *Geo.* Upon the authority of which cases the court ordered a suggestion to be made, not *quod constat curiae super examinationem*, but *quod constat curiae super sacramentum duorum credibilium testium quod, &c.* and then awarded the costs. *Vide* 2 *Vent.* 45. *contra.*

Woodcock *and* Elpington.

How the penalty against the marshal on 8 & 9 W. 3. c. 26. shall be recovered.

DARNALL Serjeant moved for a rule for 50 *l.* against the marshal upon the statute 8 & 9 *W.* 3. *c.* 26. for not giving a note testifying the defendant's being in his custody.

Per Curiam: The statute does not give us any power, it only says 50 *l.* shall be forfeited. This neglect is a contempt to the court, and therefore the marshal may be punished as used to be before this statute. You had a rule for him to own his prisoner, if he did not the court punished him to the plaintiff's satisfaction. The statute does not preclude us from punishing him, but only gives the plaintiff 50 *l.* as a further satisfaction. The penalty may be recovered by bill against the marshal, but it is not in our power to make him pay it in a summary way. The chief intent of the statute was, that such note from the marshal should be good evidence in case of an escape, to prove that the defendant was at that time in actual custody. Take a rule for the marshal to acknowlege his prisoner.

Dominus

Dominus Rex *versus* The iuhabitants of St. Olaves Jury.

A. Is bound to *B.* a cobler, who keeps a ſtall in one pariſh, lies in another, and the boy in a third, and the ſeſſions adjudge the ſettlement where the ſtall is, becauſe the ſervice was there.

Cobler's ſtall no inhabitancy to gain a ſettlement.
Caſ. of Set. and Rem. 82. pl. 106.
Seſſ. Caſ. 115, pl. 112.
Foley 222.

Per Curiam : The boy has gained no ſettlement in either of the three pariſhes, for the ſtall is not ſufficient to give him one, the maſter lying in another pariſh. Order quaſhed. See *poſt.* 60.

Between the pariſhes of St Andrew *and* St. Brides.

ORDER of ſeſſions for the removal of a wife and three children from the pariſh of *St. Andrew* to the pariſh of *St. Brides*, ſetting forth, that *A.* about twenty-three years ſince married *B.* and lived with her five years in the pariſh of *St. Brides*, and had by her four children, two whereof were dead, and the other two provided for. That at the end of five years he went away from her, and married another woman, with whom he lived ſomewhere in *England*; but that he never ſaw his firſt wife *B.* from the time of his going away.

When a wife marries a ſecond huſband, and it is found the firſt had no acceſs to her for a long time, the children of the ſecond marriage are baſtards, and the wife's ſettlement where the firſt huſband's was.
cited in Andrews. 9. Seſſ. Caſ. 117.

B. after the ſeparation (having heard nothing for a long time of *A.*) married a ſecond huſband, by whom ſhe had eight children in the pariſh of *St. Andrew*, who all went by the name of the ſecond huſband, five of them are dead, and the other three ſurvive. And the ſeſſions preſuming that the ſecond marriage of the wife is void *ab initio*, adjudge, that her ſettlement, and that of the three children, is in the pariſh of *St. Brides*, where the firſt huſband lived, as deeming the children the legitimate iſſue of the firſt marriage.

The court quaſhed the order as to the children, and confirmed it as to the wife.

Firſt, Becauſe the ſecond marriage and living with the ſecond huſband in *St. Andrew's* was void *ab initio*; and therefore the place of her ſettlement where the firſt huſband lived.

Secondly, It being adjudged that the firſt huſband had no acceſs for ſeventeen years, no preſumption ſhall be admitted but that theſe are the children of the ſecond marriage; and they not being born in the pariſh of *St. Brides*, nor having ever inhabited there forty days, can have no ſettlement in *St. Brides*.

1 *Roll. Abr.* 358. *pl.* 1. 8. *pl.* 4. 5. *Bract. lib.* 5. *fol.* 417. *Co. Litt.* 123. *b.* 2 *Roll. Abr.* 356. *Cro. Jac.* 541. *Fleta, lib.* 1. *c.* 15. 4, 5. *Bracton, lib.* 1. *c.* 9. 4. *Co. Litt.* 244. *a. Salk.* 123, 483. 7 *H.* 4. 9. All which cases were quoted to prove, that improbability will bastardize the issue, and therefore it was argued *a fortiori*, that impossibility, which was found in this case, would bastardize also.

Dominus Rex *versus* Foley and Harley.

Trial at bar granted upon consideration of the consequences of a conviction upon an information.

INformation for taking 3*s.* 4*d.* for registring a warrant of attorney, contrary to the lottery-act, which says, it shall be entred without fee or reward, and all persons offending shall be incapable to hold any place.

The defendants moved that they might have a trial at bar; for though the question seemed very short, whether they took the fee or not; yet the consequence was very considerable, the defendants are auditors for life, and that is a freehold of which they will be divested by a conviction upon this information. *Pasch.* 9 *Annae Regina* v. *Harcourt*, *Scire facias* to repeal letters patents, and there a trial at bar was had. *Sid.* 420. The crown it is true may sue any where, but when they have commenced their suit, it is in the power of the court.

On the other side it was insisted, that the court could not take notice of what would be the consequences of a conviction; that the question was short, and the *onus probandi* upon the crown, who might try it where they pleased.

Powys, *Eyre* and *Pratt*, were for a trial at bar; but the chief justice said the defendants ought not to pray a trial at bar in an issuable term. A trial at bar was granted for next term.

Stutter *versus* Freston. In C. B.

Churchwardens.

PRohibition was granted to the spiritual court, where it was libelled against the defendant, for not appearing to take upon him the office of churchwarden, though thereunto appointed by the ordinary. And it was held, that though the parishioners and parson neglect for ever so long to chuse churchwardens, yet the ordinary has no jurisdiction; for churchwardens were a corporation at common law, and they are different from questmen, who were the creatures of the reformation, and

2 came

came in by canon law. The 89th and 90th canons say, that churchwardens shall be chosen by the parson and parishioners, and if they disagree, then one by the parson and the other by the parishioners, *et alioquin non erunt*. *Per Curiam*: The proper way is to take a *mandamus e B. R.* 1 Ven. 115.

Denny *versus* Ashwell. In C. B.

A Prohibition was denied to a suit in the spiritual court for marrying his wife's sister's daughter, though cases were quoted where such a marriage has been held lawful. *Moor* 907. 2 *Keb.* 551. 1 *Sid.* 434. 1 *Mod.* 25. 2 *Lev.* 254. *contra.* 2 *Vent.* 12.

Cannot marry wife's niece. See 2 Burn's Eccl. Law. 43

Sir Robert Salisbury Cotton *and* Davies. In B. R.

UPON *non fuit electus* returned to a *mandamus* to swear the plaintiff a capital burgess of *Denbigh*, the jury find a special verdict, That by the charters there are to be two bailiffs, two aldermen, and twenty-five capital burgesses; and the direction how the capital burgesses are to be elected is in these words: "And if it happen any of the said capital burgesses to "die, or be removed, then it shall be lawful for the bailiffs, "aldermen and capital burgesses for the time being, or the "major part of them, *Quorum unum ballivorum et unum alder-* "*mannorum duos esse volumus*, to elect another." That 24 *June*, 1 *Geo.* there was a vacancy by the death of *J. S.* and *Michaelmas-day* following the bailiffs, aldermen and burgesses met and proceeded to an election. That the two bailiffs and the *major* part of the capital burgesses gave their votes for the plaintiff, and the two aldermen and the residue of the capital burgesses voted for another.

Where a power of election is vested in a set number, *quorum A.* and *B.* to be two, their presence only is requisite, and not their consent. 2 Ld. Raym. 1236.

Lutwyche pro quer' argued, that the question in this case is only, Whether upon the words of the clause, *Quorum unum ballivorum et unum aldermannorum duos esse volumus*, the consent of one bailiff and one alderman to every election be requisite, to make it good. And he took the negative of the question; and argued, that the charter only required their presence; for if it should be thought that the election cannot be without their consent, it would be in a manner to vest the whole power of election in them two; which the charter never intended. In the common case of a quarter sessions a justice of the *quorum* must be one, but yet the act of the majority binds him. 1 *Inst.* 250. 1 *Roll. Abr.* 514. *Hob.* 211.

Cheshyre Serjeant *contra.* Unless there be one bailiff and one alderman consenting, there can be no election. What signifies their presence, if they disavow the election? There is Serjeant *Whitaker*'s case, *Hil.* 3 *Annæ*, *Salk.* 434. By the charter of *Ipswich* power is given to the bailiffs, burgesses and commonalty to remove the recorder, *quorum* the two bailiffs *duos esse volumus.* Upon a *mandamus* to restore Serjeant *Whitaker*, they return, that he was removed by the bailiffs, burgesses and commonalty, the two bailiffs being present; and it was objected and adjudged, that their consent was as necessary as their presence. 3 *Mod.* 3. If they are present and dissent, how can the election be said to be by them?

C. J. This is like the case of the city of *London*, where the mayor and common council have power to do acts; and yet the act of the majority of the common council is good, though the mayor dissents. In this case there is nothing required but the presence of one bailiff and one alderman at every election, and they have no negative voices; to which the rest of the court agreed, and a peremptory *mandamus* was granted.

Newman *versus* Holdmyfast, Mich. 3 Geo. rot. 194.

Ejectment lies *pro communia pasturae* generally, if joined with other lands.

Ejectment for lands, *acetiam pro communia pasturæ.* And after verdict for the plaintiff, it was moved in arrest of judgment, that it ought to have been mentioned, what sort of common: because an ejectment will not lie for all sorts, such as common *pur cause de vicinage.* And that a commoner cannot maintain trespass, and much less an ejectment. And *Co. Litt.* 4. *b.* *Bro. Common* 24. *Trespass* 213. *Yelv.* 143. *Cro. Car.* 492. 1 *Lev.* 212. were cited.

Sed per Curiam: After a verdict it shall be intended to be such common for which an ejectment will lie, as common appendant or appurtenant. And the general expression of *common* must relate to that which is most usual, just as the word *tenure* imports a tenure in socage. Fines and recoveries are *de communia pasturæ* generally. 1 *Cro.* 301. 3 *Keb.* 738. 1 *Jon.* 315. *Mich.* 1 *Geo.* *Cave* v. *Hunt*, in the Exchequer-chamber, this objection was over-ruled. He that has possession of the land has possession of the common, and the sheriff by giving possession of one, executes his writ as to the other.

N. B. This was not a motion in arrest of judgment, but came from *C. B.* by writ of error to *B. R.* where the judgment was affirmed.

Trinity

Trinity Term.

3 Georgii Regis. In B. R.

Thomas *Lord* Parker, *Chief Justice.*

Sir Littleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Justices.*
Sir John Pratt, *Knt.*

Sir Edward Northey, *Knt. Attorney General.*

Sir William Thompson, *Knt. Recorder of* London, *Solicitor General.*

Dominus Rex *versus* Major', &c. Norwic'.

PAGE Serjeant moved for a *supersedeas* to a *mandamus* directed to the mayor, aldermen and common council, to go to the election of a town clerk, upon an *affidavit* that the writ was mis-directed; for it was neither to the corporation by the corporate name, nor to the mayor and aldermen only, in whom the right of election was. And the court said, they would not expect a return to this writ, which was directed to the common council, who had no right, but grant a *supersedeas quia improvide emanavit.* But upon proposals of trying the right in a feigned issue, no *supersedeas* went.

When a *mandamus* is directed to those that have and those that have not a right, the court will supersede it. Salk. 699, 701. cited in Andrews 180.

Dominus Rex *versus* Percivall & al'.

The sessions may by virtue of 43 Eliz. charge parishes out of the hundred towards the maintenance of the poor within that hundred, before two justices have adjudged that the hundred is not able.

ORDER of sessions reciting, that the parish of *A.* is not able to maintain its own poor, nor any other parish within the hundred to contribute; therefore the justices at the sessions tax other parishes in another hundred within the same county to the relief of the poor of the parish of *A.*

Reeve moved to quash it, and insisted that the 43 *Eliz. c.* 2. §. 3. gives no authority to the sessions to charge people out of the hundred, till two justices have inquired whether any parish in the hundred can contribue. The first application to be to two justices, and the second to the sessions.

Salk. 480.

C. J. I do not see to what purpose it would be for the two justices to make an order, only to adjudge that no parish within the hundred is able to contribute. We will presume the sessions is satisfied of that, and if the two justices should make such an adjudication, yet the sessions must inquire into the truth of it; and if no order appears which charges any parish within the hundred, it is a sufficient ground for the sessions to act. This is like the case of apprentices bound out by justices: for there, if there be any disagreement, the master and servant may go before two justices to make an end between them, and if the justices cannot, then to the sessions: But yet it has never been held, but that the sessions has an original jurisdiction, and the parties are intitled to be heard at the sessions, tho' they never went before two justices. *Salk.* 67, 68. 1 *Ven.* 174. *Salk.* 491. In this case if the justices had charged any parish within the hundred, that would have stopped the sessions from proceeding; and the sufficiency of the hundred depends on this, whether two justices have ever charged the hundred. *If the two justices do not think the hundred able*, (that is) if they do not adjudge it so. If two justices should adjudge the hundred not able, yet if other two justices adjudge the contrary, their charge would be good, and the sessions be ousted of their jurisdiction notwithstanding the first adjudication.

Sessions has an original jurisdiction to discharge apprentices.

Eyre J. Here are two jurisdictions, that of the two justices, and that of the sessions, and both are original jurisdictions. They are different in all respects, for the two justices have no power out of the hundred, nor the sessions within it. There need be no appeal from an adjudication of two justices, for that would be to appeal from a nullity. Order confirmed.

The

The Pariſhes of South Sydenham *and* Lamerton.

ORDER of two juſtices for the removal of *A.* and his wife from the pariſh of *Lamerton* to the pariſh of *South Sydenham*, wherein the caſe was ſpecially ſtated, That about 27 years ſince the mother-in-law of *A.* dying, he entered into a term of years in *South Sydenham* in the right of his wife, and lived upon it two years, but never took out adminiſtration to the mother.

Taking an entire tenement of 10*l.* *per ann.* gains a ſettlement tho' it lies in two pariſhes; *aliter* of two diſtinct tenements making together 10*l.* *per ann.* in different pariſhes.

That at the end of two years he removed to *Lamerton*, and took a leaſe for 99 years, determinable upon three lives, at the yearly rent of 7*l.* 10*s.* whereof 4*l.* 10*s.* lay in *South Sydenham*, and the reſidue, and alſo the meſſuage, lay in *Lamerton*, where *A.* has lived for 25 years. That the premiſſes were of the yearly value of 13*l.* but in regard 7*l.* 10*s.* rent only was reſerved, and 4*l.* 10*s.* of that lay in *South Sydenham*, and he had formerly lived there two years; therefore the juſtices adjudge the ſettlement to be there.

Seſſ. Caſ. 122. 10 Mod. 388. Setl. and Rem. 78. pl. 103. 19 Vin. Abr. 388. pl. 9.

Glyde Serjeant moved to quaſh it, for a man may have a right to ſeveral ſettlements, and yet be ſettled in one only. The right of adminiſtration gave him no ſettlement in *South Sydenham*, for there muſt be an actual adminiſtration.

Reeve contra. The term is but a chattel, to which he is intitled without adminiſtration. The ſettlement was good at *South Sydenham*, but the queſtion is, whether he has ſince gained any at *Lamerton*. The ſtatute 13 & 14 *Car.* 2. *c.* 12. requires him to take a tenement of the yearly value of 10*l.* what the value is, muſt be adjudged by the rent reſerved, and that is only 7*l.* 10*s.*

C. J. If *Lamerton* be a good ſettlement, the order is wrong. The quantity of the rent is not material, but the value of the land. A tenant often pays a fine, and thereby lowers the rent, and yet the land is of equal value. And if a man ſhould out of kindneſs ſettle another in a tenement of 10*l.* *per annum* value, reſerving no rent, yet that will not alter the caſe.

The only difficulty is, that there is not in this caſe 10*l.* *per ann.* in one ſingle pariſh. As to that I am of opinion, that if ſuch a perſon as this ſhould take a tenement of 8*l.* *per ann.* in one pariſh, and another of 3*l.* *per ann.* in a different pariſh, that would not gain him a ſettlement in either; but if the tenement be entire, and the houſe in one pariſh (as this caſe is) and part of the land in another; yet this may properly be called a tenement of

Inter paroch. North Riſton *and* Wooton Underidge, Mich. 1 Geo. adjudged that taking two diſtinct tenements, both making up 10*l.* *per ann.* in the ſame pariſh, gives a ſettlement. Salk. 535.

10*l.*

10 *l. per annum* in that pariſh where the houſe is. The law preſumes that a perſon capable to be entruſted with the management of 10 *l. per annum* is not likely to become chargeable; but is able to maintain himſelf. Two diſtinct tenements in two pariſhes, making together 10 *l. per annum*, will give no ſettlement. But it ſeems to me to be otherwiſe where the tenement is intire.

Eyre J. *accord'*.

Pratt J. This man has fully ſatisfied the words of the act of Parliament. The miſchief was, that the poor went to the pariſhes where were the beſt common and privileges; and when they had conſumed that, removed to another. The only way to remedy this was, to ſend them back again. Though part of the 10 *l. per annum* lies in one pariſh, and part in another, yet the man is not a whit the poorer, or leſs able to provide for himſelf. There are conſiderable farmers who do not rent 10 *l. per annum* in any one pariſh, and it would be hard to adjudge that therefore they gain no ſettlement.

Per Curiam: The ſettlement is at *Lamerton*, and therefore the order of removal to *South Sydenham* muſt be quaſhed.

Dominus Rex *verſus* Ballivos de Morpeth.

Mandamus lies to reſtore a ſchool-maſter of a grammar ſchool founded by the crown.

MANDAMUS to reſtore *A.* to the office of under ſchool-maſter of a grammar ſchool at *Morpeth*, *vel cauſam nobis ſignificetis:* And the writ ſets forth, that King *Edward* the ſixth founded this ſchool, and appointed that there ſhould be two maſters and an uſher *imperpetuum*.

Return, that at the time of publiſhing the act *primo* of his Majeſty's reign the ſaid *A.* was under ſchool-maſter, and that he never took the oaths by the act appointed to be taken; *ratione cujus* he became incapable, and therefore they cannot reſtore him.

Lutwyche. This is an improper return. The writ ſuggeſts a poſſeſſion and expulſion, and therefore they ought to lay the reaſons of turning him out before the court. There does not ſo much as a power of turning him out appear.

Bootle contra. The writ does not command them to ſhew cauſe why they turned him out, but only to reſtore him, or ſhew cauſe. By the words of the ſtatute he is *ipſo facto* deprived upon

upon upon a neglect to take the oaths, so no formal expulsion was requisite. *Show.* 274. 4 *Mod.* 52.

A *mandamus* does not lie in this case. *Mandamus's* are granted to restore people to publick offices, where the administration of justice is concerned; and if the place be a freehold, the party aggrieved may have an assize; if of a lesser nature, an action for the special damage. *Mich.* 2 *Ann.* *Vaughan's* case. A *mandamus* to restore him to the office of prover of guns in the *Tower* was denied, because of a private nature: And *Holt* C. J. said, a *mandamus* would not lie to restore a register of an ecclesiastical court. *Show.* 252. 3 *Mod.* 335. *Show.* 217, 261, 251. *Mandamus* denied for a proctor of *Doctors Commons*. And in 1 *Sid.* 169. for a steward of a court baron; and in *Stiles* 458. for an usher. 1 *Sid.* 40, 29, 71. 1 *Keb.* 5. and in *Show.* 74. for a fellow of a college. *Vide* 1 *Ven.* 143. 2 R. Raym. 989. 6 Mod. 82.

Lutwyche replied. Though it may not lie for a master of a private school; yet it will for this, which is a free grammar school founded by the crown. The education of youth concerns the publick, and therefore the masters are required to take the oaths. A *mandamus* was granted for the clerk of *St. Dunstan's*; and in 1 *Ven.* 143, 153. for a sexton and scavenger. And it will be no answer to say, that an assize or an action may be brought; for the court grants *mandamus's* every day for freeholds, and the party has his election which remedy to take.

Mandamus lies for a parish clerk, sexton and scavenger, for clerk of the peace. Show. 282. 2 Sid. 112.

C. J. This is of a publick nature, being derived from the crown. I think the defendants were not obliged to shew cause why they turn him out, but only why they do not restore him. But still this return is insufficient: It is only that he did not take the oaths *in actu praed' mentionat'*; now he is not obliged to take the *Scotch* oath. They should have said, that he did not take the oaths of allegiance, abjuration and supremacy, or the oaths required to be taken by a school-master. The act excepts officers in the *Fleet*, *&c.* and therefore it should appear he is not excepted: For the party having no opportunity to plead in this case, the return ought to be certain to every intent. And tho' we grant a peremptory *mandamus*, that will not be final; for if he has not qualified himself, he is *ipso facto* deprived, and our granting a *mandamus* will have no effect. Show. 365.

Eyre J. All that is set forth in this return may be true, and yet this man no ways disqualified. In the case of a parish clerk we granted a *mandamus* upon solemn debate. A peremptory *mandamus* was granted.

Kitson

Kitſon *and* Fagg.

Under-ſheriff's clerk cannot aſſign a bail-bond. Lucas 288.

UPON a caſe at the aſſizes the queſtion was, whether a bail-bond was well aſſigned by the under-ſheriff's clerk.

Parker C. J. ſaid, he had had the advice of all his brothers, and they were of opinion, that an under-ſheriff himſelf might aſſign a bail-bond in the name of the high-ſheriff, it having been the conſtant practice ever ſince the ſtatute 4 *Ann. c.* 16. but that if the aſſignment was neither by the high-ſheriff nor his under-ſheriff, it would not be good; and that being the preſent caſe, the defendant had judgment.

Pariſhes of St. Mary Colechurch *and* Radcliffe.

Apprentice gains a ſettlement where he lies. Seſſ. Caſ. 123. pl. 116. Foley 223. Forteſ. Rep. 306. Caſ. of Set. and Rem. 81. pl. 105. *Ante* 51.

A. Is bound apprentice to a ſeafaring man, and ſerved him for a quarter of a year in the day-time on land, in the pariſh of *St. Mary Colechurch*, but lay every night on ſhipboard in *Ratcliffe*. But the juſtices apprehending the ſettlement to be where the ſervice was, ſend him thither.

Corbett moved to quaſh this order; and likened it to the caſe of the cobler laſt term.

F. N. B. 160. b. 2 Inſt. 122.

C. J. A man properly inhabits where he lies; as in the caſe where the houſe is in two leets, he is to be ſummoned to that in which his bed is. Order quaſhed.

Croſſier *and* Ogleby.

Goods taken in inteſtate's life and kept till his death, though uſed afterwards, is a trover and converſion in the inteſtate's life.

TROVER by an adminiſtrator for rum taken and converted in the inteſtate's life. Upon evidence it appeared, that the rum was taken in the inteſtate's life, but not uſed till after his death. And the queſtion was, whether this evidence of not uſing it till the adminiſtrator's time would not overthrow the declaration of a converſion in the inteſtate's life.

Sed per curiam: The time of uſing the rum lay in the breaſt of the defendant, who ought to have diſcloſed that matter by his plea: And the taking it in the life of the inteſtate, and keeping it till his death, is a trover and converſion ſufficient to maintain this declaration. Wherefore the plaintiff had judgment, this being a point reſerved at *niſi prius*.

Dryer

Dryer *versus* Mills & al'.

At nisi prius *in* Middlesex, coram Parker *C. J.*

TRESPASS for taking materials of a house; Not guilty pleaded; and the C. J. would not admit the defendant to give evidence of taking the goods as a Deodand, because he might have justified; and then the plaintiff would have had an opportunity to give an answer to it.

On Not guilty cannot give evidence of taking the goods as a Deodand. *Vide* Co. Lit. 53. a. 283.

Dix *versus* Brookes.

THE plaintiff declares, that the defendant broke and entered his house, and assaulted his wife. After verdict for the plaintiff it was moved in arrest of judgment, that the wife should have joined in this action, and by her not joining the defendant pays damages to the husband, and yet the action for the assault will survive to the wife, and so the defendant be doubly charged. Besides, that here is no laying *per quod consortium amisit*, to intitle the *baron* only to sue and exclude the wife. *Yelv.* 89. *Godb.* 369.

Baron may bring trespass for entering his house and beating his wife. Fortesc. Rep. 378.

Econtra it was insisted, that the breaking and entering the house was the cause of action, and the beating the wife alleged only in aggravation of damages: And if that had not been alleged, it might have been given in evidence under the *alia enormia*. 1 *Keb.* 787. 1 *Sid.* 225. 2 *Cro.* 664. 1 *Mod. Ca.* 127. *Salk.* 119, 642.

Et per Curiam: The plaintiff may join that in his declaration to aggravate damages, for which he singly could not recover, and the party injured have his separate action. As in the common case of trespass for beating a servant, *per quod servitium amisit*; both master and servant may recover. And in the case of *Newnam* v. *Smith* it was held, that the plaintiff might allege the beating his daughter in aggravation of damages. *Salk.* 642. The plaintiff had judgment.

Dominus Rex *versus* Episcopum Miden. in Hibernia,

Intr. Trin. 12 Ann. rot. 290.

The statutes of jeofails extend to suits by the crown in *quare impedit*.

IN a *quare impedit* brought by the crown, the original writ was returnable at a general return, and the *venire* at a day certain; and it was insisted to be error, because throughout the cause the process should be uniform.

2 Stra. 947. S. P. accord.

Sed per Curiam: Tis not a discontinuance, but a miscontinuance; which is helped by 32 *H.* 8. *c.* 30. and though the King is a party, yet in these his civil suits the statutes of jeofails extend to the crown. The judgment was affirmed.

Michaelmas

Michaelmas Term

4 Georgii Regis. In B. R.

Thomas *Lord* Parker, *Chief Justice.*

Sir Littleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Justices.*
Sir John Pratt, *Knt.*

Sir Edward Northey, *Knt.* *Attorney General.*

Sir William Thompson, *Knt.* *Recorder of* London, *Solicitor General.*

Anonymous.

THE court refused to grant a *Mandamus* to justices, to make a rate, to reimburse two of the inhabitants their charges in defence of an indictment for not repairing a bridge. Mandamus.

Cork *versus* Baker. Ante 34.

THE defendant having brought a writ of error of a judgment in *C. B.* assigned for error a *Clausum fregit* original, and took out a *Certiorari* to verify his errors. The *Custos brevium* of the common pleas, instead of certifying the original, returned that there was such a writ in his office, but that the plaintiff in the original action, having entered a *Ne recipiatur*, he could not file the original, and consequently could not return it.

Upon this the plaintiff in error applied to this court. And a rule was made, for Mr. *Yates*, the deputy *Custos brevium*, to attend. And after counsel had been heard on both sides the court delivered their opinions.

C. J. This practice of entering a *Ne recipiatur* is very new, and in my opinion very absurd. There may indeed be some colour to say, that if the plaintiff neglects to file his original in order to warrant his judgment, that then the defendant may stop the filing it; but that reason will not hold in this case, which is a *Ne recipiatur* entered by the plaintiff against filing his own writ, after he has had the benefit of it, by intitling that court to hold plea, and convene the defendant before them. Their authority is grounded only on the king's writ out of chancery, except they proceed by way of privilege. And the statute which helps want of an original, never intended they should proceed without; but only went upon a supposition, that there had been one, which was lost; and therefore in all those cases where want of an original is helped, yet a bad original is not. 1 *Sid.* 84. *Yelv.* 109. 5 *Co.* 37. *b.* *Salk.* 267. If this practice was to prevail, no bad originals would ever be filed, but judgments be affirmed upon presumption the original is lost, when in truth there never was a good original at all.

Matter of fact relating to the proceedings must be fairly laid before the court that has power to examine into those proceedings; and we will make the filazer, or the plaintiff, carry in and file the original, rather than the party shall not have justice done him; or withdraw the *Ne recipiatur*, if that was of any effect. When a writ is in the *Custos brevium*'s office, it is filed in judgment of law, though the officer does not annex it to the bundle of writs. It is an unreasonable position, that as soon as the plaintiff has had the benefit of the writ, he should be suffered to stifle it. Every defendant has a right to reverse an erroneous judgment; and he that takes upon him to obstruct that, is guilty of a very great abuse; and in my opinion ought to be punished.

Powys J. To deny the means is to deny the thing.

Eyre J. The court having power to redress, has, as incident thereto, a power to come at every thing which is necessary for their information. And the officers of *C. B.* are *pro hac vice* officers of this court; and we will not pray in aid of the common pleas, to make the officer do his duty. His return amounts to no more than this. He says the writ is not filed; why? Because I do not do it; though I am paid for it, and it is my duty to do it.

Pratt

Pratt J. The proceedings of the two courts seem to clash, and I shall always be very ready to pay a due respect to the court of common pleas. But that will never carry me so far, as to compliment them with our jurisdiction. And in cases where that comes in question, I think a man ought not to be mealy-mouthed, and in vindicating our own jurisdiction, we only act up to the rules of law and our own oaths. This court is superior to the court of common pleas, and they ought not to have laid an inhibition upon the officer, from filing this writ. When we are told, there is error in the proceedings, we must make all proper inquiries; and the party has a right to demand it of us. And when we issue a *Certiorari*, to return up this original; shall the officer say, there is such an one, but I will not file it? And can it be expected, that we shall stand still, till the truth of this is falsified in an action for a false return? Mr. *Yates* has endeavoured to trip up the heels of our jurisdiction, and therefore ought to be committed, unless he obeys immediately.

Mr. *Yates* refusing to alter the return, was committed. He immediately applied to the common pleas for a *Habeas corpus*, whither being carried, the return was read, that he was committed by the court of *B. R.* *pro contemptu*. And then *Cheshyre* moved, that the return might be filed; which being done, he moved, that Mr. *Yates* might be discharged; and argued, that the commitment was too general, for that some cause of commitment must appear, to restrain a subject of *England* of his liberty. It is not so much as said to be a contempt upon confession, verdict, or examination.

2 Ven. 22. *Habeas corpus* returnable in C. B. Carter 221.

Secondly, The time should appear. For it might be before the act of grace; and returns must contain certainty in themselves, because they are not traversable.

Pengelly quoted *Bushel*'s case in *Vaughan*. 1 *Roll. Rep.* 119, 192, 220, 245. *Moor* 840. *Carter* 221. And argued, that though it is said, the defendant *praesens hic in curia committitur*; yet that doth not infer, that due examination was had.

Vide Lord Shaftesbury's case, 2 vol. Trials 62.

Whereupon the court took time to consider, and look into the cases; and in the mean time the parties made an end of the cause, and applied to *B. R.* for leave to enter a *Nolle prosequi*, which was granted. And then a motion was made, that Mr. *Yates* might be discharged, which upon consent, and intercession of the prosecutor, and an affidavit of his indisposition, and setting a small fine upon him, was granted. But the C. J. said, that if Mr. *Yates* had been there, he should have told him, that he must not think of giving such shuffling answers to the

king's writ of *Certiorari*; and that this court has power, if their commitments are queſtioned, to juſtify their own proceedings.

Dominus Rex *verſus* Marriott.

Conviction for killing a hare, ill *quia* the witneſs ſwears generally a man is not qualified. Seſſ. Caſ. 125.

CONviction before one juſtice for keeping a greyhound; reciting, that one *William Towne* came and informed, that the defendant, being a perſon *not qualified* to keep a greyhound, did nevertheleſs keep one at *A.* and another at *B.* and with them killed one hare at *A.* and two at *B.* and that he being ſummoned did appear, and being aſked what he had to ſay, offered nothing in excuſe, and *ideo* the juſtice convicted him.

Pengelly Serjeant objected, that the juſtice ſhould ſet out, why the defendant is not a qualified perſon, as that he is not the ſon of an eſquire, nor has 100 *l.* *per annum* in his own or his wife's right. For he ought not to make himſelf the ſole judge, but give the reaſons at large. *Weſt precedents tit. Indictments*, §. 129. *page* 145. §. 270. *page* 147. §. 298. 1 *Saund.* 262.

Reeve contra. The conviction has purſued the words of the act, in ſaying the defendant *not being qualified* did ſo and ſo. The caſes quoted are upon ſtatutes where the expreſs qualifications are mentioned, but the ſtatute 5 *Annae*, *c.* 14. which gives the penalty, ſays only, "not being qualified according to the ſtatute 22 & 23 *Car.* 2. *c.* 25." The defendant at the time of the conviction might have ſhewn himſelf qualified, for there the affirmative lies.

In orders of removal it is ſufficient to ſay, the perſon came to ſettle contrary to law, without adding, "not having 10 *l. per* "*annum*, &c." though thoſe are the qualifications required by the ſtatute; and an order is as much a judgment as this, and the ſame reaſon holds in both caſes.

Pengelly. The ſtatute 22 & 23 *Car.* 2. limits the qualifications, and 5 *Annae* the penalty; and both theſe muſt be conſidered together as one act. For where one ſtatute makes the offence, and another inflicts the puniſhment; it ought to appear, that the proceedings tally with both. *Plowd.* 206. *Allen* 49. *Cro. Eliz.* 750. This caſe differs from that of an order, for there an appeal lies, but here the judgment is final.

Plow. 51. a. b.

The chief juſtice ſeemed to think the conviction would be good, having followed the words of 5 *Annae*, and that if the defendant was qualified, he ought to have ſhewn it before the juſtice, being ſummoned for that purpoſe. But then *Eyre* J. ſtarted

started an objection, that it was not the justice that had taken upon him to say the defendant was not qualified, but only the witness, for the conviction runs, that the witnesses being swore, " dicunt " et jurant et uterque eorum dicit et jurat quod defendens *ex-* " *istens persona minime qualificat*' did such a day keep a grey- " hound ;" so that it appears, the witness has given the law to the justice, and takes upon himself to judge of the defendant's qualifications, and the justice is only made use of as an instrument, to reduce the opinion of the witness into a conviction.

C. J. The *existens &c.* should be the conclusion of the justice, and not the words of the witness; for he ought not to swear generally a man is not qualified, and such a general proof will not be good. This is only an invention, to support a conviction in general terms, which would be bad if the particular facts were alleged.

Pratt J. Where the justices have a summary jurisdiction, and no appeal lies (as in this case) we must keep them up strictly to the law; and I should be glad if we could make them set out the whole particularly. But in this case I think it cannot be understood, that the *existens, &c.* are the words of the witness, for it cannot be supposed that he swore in *Latin*, and therefore I look upon this as the substance of the evidence reduced by the justice into form. If words are set out in *English*, we keep the witness strictly to the words; but where they are turned into *Latin*, if the substance and effect of them be proved, it is sufficient.

C. J. If ye render it in *English*, it is no more, than that the witnesses swore, that the defendant, not being a person qualified according to law, kept a greyhound And we cannot intend, they swore negatively to every qualification. If any one of the qualifications had been omitted, the conviction would have been bad; and so it will be, when all are omitted. This is a record that the witness upon oath deposed so and so. I have seen all the qualifications negatively recited in orders of removal.

Eyre J. *Rex* v. *Green*, a conviction was quashed, where the witness deposed *de veritate praemissorum*. In *English* depositions the effect is only set out, that the witness swore that, *&c.* And though this is only the recital made by the commissioners, yet it is as large as the words of the witness; and we must intend this evidence was taken in the same manner. The witness here cannot be indicted for perjury, in swearing the defendant was not the son of an esquire, *&c.* because he has conceived the matter in such general terms. I do not see how he could honestly swear this; for I believe, had he been asked, as soon as he had

Contra Salk. 369.

ſaid the defendant was not qualified, what the qualifications are, he could not have told you.

Adjournatur. And afterwards *Pengelly* mentioned two caſes, *Regina* v. *Hayward*, *Paſch*. 12 *Annae*. There it was, "not "being qualified, licenſed or authorized to keep any engine, "&c." and it was quaſhed. The other was the ſame term, and quaſhed becauſe no qualifications were mentioned. And towards the end of the term this conviction was * quaſhed; and the principal reaſon declared to be, becauſe the witneſſes had taken upon themſelves, to judge of the qualifications.

* See 1 Bur. Rep. 148. S. P. ſettled accord.

Jones *verſus* White.

Quaere, whether the coroner's inqueſt may be given in evidence in an action?

UPON a trial at bar on a feigned iſſue out of chancery, where the queſtion was, *Deviſavit vel non*; to overthrow the will the defendant inſiſted, that the teſtator was *Non compos* at the time of making it, which was the 29th, having ſhot himſelf the 31ſt. And amongſt other circumſtances the coroner's inqueſt, which found him lunatick, was offered to be read. But being oppoſed by the other ſide, the court delivered their opinions.

C. J. The plaintiff in this caſe is executrix, and the inqueſt for her advantage, ſince the perſonal eſtate is ſaved by finding lunacy; and therefore I think it may be read againſt her. In my lord *Derby*'s caſe an inqueſt *poſt mortem* was allowed to be given in evidence. If this be read, it will have very little weight, for it only finds him lunatick *eo inſtante*, 31ſt, which is no concluſive evidence, that he was ſo the 29th. *Powys* J. with the C. J.

Eyre J. This is a criminal matter, and ought not to be given in evidence in a civil proceeding. A verdict on an indictment of battery cannot be read in an action for the ſame battery. An inqueſt *poſt mortem* was in the nature of a civil proceeding, but this is criminal, for it might induce a forfeiture of the goods, if he had been found *ſeio de ſe*.

1 Sid. 325.

Pratt J. If a verdict be given in evidence, it muſt be between the ſame parties; and therefore an indictment which is at the ſuit of the king, cannot be read in an action, which is at the ſuit of the party. The wife is no witneſs here, as ſhe was before the coroner; ſo that this would be to read her againſt herſelf. The reaſon why an inqueſt *poſt mortem* may be read is, becauſe of the antiquity of it, or to prove a pedigree.

The

The court being divided, it was not read, till *Pratt* desired it might for this time, being only to inform the conscience of the Chancellor, and that nothing might be said to be wanting to clear this question.

Dominus Rex *versus* Wakefield.

THE defendant was coroner of *Litchfield*, and as such took an inquisition *super visum corporis* of a man that hanged himself, whereby he was found *felo de se*. It fully appeared to the jury, that the man was lunatick; but the defendant, in order to cover the goods, told them that the finding him *felo de se* was only matter of course, with which they were contented, and found accordingly. Coming afterwards to be better informed, what the consequence would be; they applied to the coroner, and told him they were fully satisfied, the man was a lunatick, and desired he would take the verdict so: And thereupon he drew up the inquisition, and they all set their hands and seals to it. A *certiorari* being brought, he returned up the first inquisition, that he might still cover the goods; and the court stayed the filing it, and committed him. 2 *Sid.* 90, 101, 144. *Mich.* 1 *Geo. B. R. Rex* v. *Keddington*, the filing staid on the same account,

Coroners punished for ill practice.

Vide 1 *Ven.* 352. where such an inquisition was quashed: *sed quaere* how that could be, it not appearing on the record.

Dominus Rex *versus* Vandeleer.

THE justices at the sessions order an apprentice, who had been ill used, and not provided for, to be discharged, and that the master having received 5 *l.* with him, should refund 3 *l.* as a further provision for him.

Justices cannot order money to be returned on discharge of an apprentice.

This was moved to be quashed, because the statute 5 *Eliz.* c. 4. §. 35. which gives the justices power to discharge apprentices upon complaint to them, gives them no authority to order any money to be returned.

Per Curiam: It is very hard, that if the master misuses his apprentice the next day after he is bound, he should pay back nothing if he is discharged. It will be an encouragement to masters, to treat their apprentices ill; but the statute being silent, the order must be quashed.

Salkeld 68. It was held, that the justices might order money to be returned, as a consequence of their power to discharge. *Ibid.* 67, 490.

Dominus Rex *versus* Lewis.

Information. Barnard K. B. 11.

AN information was moved for against a clergyman, for perjury at his admission to a living, upon an affidavit that the presentation was simonaical. But the court refused to grant it, till he had been convicted of the simony.

Young *versus* Holmes.

At nisi prius *in* Middlesex. B. R.

On a devise of a term to an executor for life, he takes as executor and not as legatee without a special assent.

UPON Not guilty in ejectment the case was, That lessee for years devises the term to the executor for life, paying 50 *l.* to *J. S.* remai nder to the lessors of the plaintiff. The executor died, and his executrix entered upon the residue of the term, and possessed herself of the lease.

1. It being proved, the defendant had the lease in her custody, and refusing to produce it; an attorney who had read it was allowed to give evidence of the contents. And the C. J. said, he would intend it made against the defendant, it being in her power if it was otherwise to shew the contrary.

What is an assent.

2. For the defendant it was insisted and agreed to by the C. J. that *James Holmes* took the term as executor and not as legatee, and then the remainder over was not executed, and that it was incumbent on the remainder-men to prove a special assent thereto as to a legacy. Upon this they called a witness, to prove payment of the 50 *l.* charged upon the term in the hands of the legatee; and this was held a sufficient assent, and the plaintiff obtained a verdict. *Plow.* 544. *a.* 8 *Co.*, 95. *a.*

Blewett *versus* Bainard.

Hil. 3 Geo. rot. 519.

A juror withdrawn for a view may be sworn at the second trial. S. C. Com. Rep. 248.

ON error from *C. B*, it was assigned, that *Abraham Saunders*, who on the first trial was withdrawn in order for a view, was sworn on the second panel: And *in nullo est erratum* pleaded.

The plea of *in nullo est erratum* was agreed to be a confession of the fact, and a demurrer to the matter of law: And at

2 first

first the court inclined this was error, becaufe it muft be taken he was withdrawn as a perfon admitted by both parties to be improper to try the caufe. But afterwards on confideration they held it to be right enough; and that if it was an exception, it fhould have been taken before he was fworn. But being withdrawn ony for a view, they held it would be no objection, and affirmed the judgment.

Lord Kildare *verfus* Fifher.

Paf. 3 Geo. rot. 2.

ON error from *Ireland* in ejectment it was objected, that it was brought (*inter al'*) for 100 acres of mountain, which is a defcription of the fituation, and not the quality of the land. And 11 *Co.* 55. 2 *Roll. Rep.* 166, 189. *Palm.* 100. *Hadr.* 58. were cited,

Ejectment lies for mountain in *Ireland*.

9 Vin. Abr. 336. pl. 19, 349. pl. 43. Andr. 107. Barnard. B. R. 155.

Econtra. It was infifted, that ejectments have been held to lie for that in *Ireland*, which is not a known defcription here; as for *Bog*, 1 *Cro.* 511. 2 *Keb.* 745. *Paf.* 3 *Ann. Hiud.* v. *Hancock*. Ejectment in *Ireland* for a knave of land was held well, on certificate from thence, that it was a term ufed there.

After the caufe had been adjourned, the C. J. delivered the opinion of the court. I have looked into the cafe of *Stafford* v. *Macdonolph*, in *Palm.* 100. and 2 *Roll. Rep.* 166, 189. which *Rolle* never tranfcribed into his abridgment. He being at that time the experter reporter, has given the fulleft account, and is chiefly to be regarded. For that cafe is 17 *Jac.* 1. and *Palmer* was not attorney general till King *Charles* the Second's Reftoration, (1 *Sid.* 465.) and muft be very young, when that cafe was adjudged. There it is admitted, that a *praecipe* would lie *de jiagno*, of a carve, and an ox-gang; *a fortiori* will an ejectment, which requires rather lefs certainty than a *praecipe* They were inclined however to be guided by the opinion that had prevailed in *Ireland*, and therefore referred it to two who had been Judges in *Ireland*, and defired them to confult Sir *William Parfons*, and upon his authority they certified, that the word *mountain* in the general acceptation was ufed to denote the fituation and not the quality of the land, and upon that the judgment was reverfed. This cafe did not give us any fatisfaction; though we agreed with the Judges to be guided by the fenfe of the *Irifh*, yet we have not thought fit to take the fame method: And have therefore propounded to them feveral queftions, which are anfwered by the Chancellor, the two Chief Juftices, the Chief Baron, and four other of the Judges. And I have fince fhewed

 it

it to two of the Judges, who were here in the vacation, and they concur with the rest.

1. The first question we propounded to them was, whether in demand the word *mountain* is understood to describe the quality of the land, or only the situation?

To this they answer: That it describes both, and is a sort of coarse land that yields little or no profit. For the *English*, upon their settling there, called such land as they improved *arable*, and the uncultivated part went by the name of *mountain*. And the Lord Chancellor adds, that it does not so much as necessarily include the situation, for he has a great deal of coarse land which is called mountain, and yet does not lie upon a hill, but is as low as the arable land about it, and that a boy can distinguish which is arable and which is mountain.

2. Whether fines and recoveries, and writs of dower, are usually brought of mountain?

In answer to this they have sent us abundance of precedents from King *James* the First to this time; and add, that it would be of mischievous consequence, if it should be thought that *mountain* was no description, since it would shake all the settlements in the kingdom.

3. Whether ejectments are usually brought of mountain, and whether this point has received any judicial determination?

To this they answer: That it happens very often, but has never been judicially determined, because it is so common as never to be questioned.

As to the case in the Exchequer Chamber of *Holborn* v. *Babbington*, we are assured, that judgment was reversed upon another point, whether a challenge was well allowed, and the other objection only mentioned by one of the Judges.

Since therefore the precedents are with the present case, and the thing reasonable in itself, and the sheriff may as easily know how to deliver possession of mountain, as of a crave, or an ox-gang; we are all of opinion, that an ejectment will lie for mountain in *Ireland*, and consequently the judgment must be affirmed.

Hilary

Hilary Term.

4 Georgii Regis. In B. R.

Thomas *Lord* Parker, *Chief Justice.*
Sir Littleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Justices.*
Sir John Pratt, *Knt.*
Sir Edward Northey, *Knt. Attorney General.*
Sir William Thompson, *Knt. Recorder of* London, *Solicitor General.*

Dominus Rex *versus* Inhabitantes de Westwood.

IN an order of removal the complaint was recited to be to one justice only, but the ordering part is by two justices; and this was held good. Then exception was taken, that there was no adjudication of the place to which he was removed being his last legal settlement, but only "*We order him to be* "*removed to* A. *as the place of his last legal settlement.*" And for this fault the order was quashed. *Fortesc. Rep.* 303.

The complaint may be to one justice, the order of removal must be by two. Salk. 478, 488. cited in Andrews 239.

Dominus Rex *versus* Loggen et Froome.

INdictment against defendants for extortion, setting forth, that the defendant Dr. *Loggen* being chancellor, and the other defendant register of the bishop of *Sarum*, did force one *Thomas Hellier*, executor of the will of *Mary Alston*, to prove the said will in the said bishop's court, *ubi* they *bene sciebant* that the said will had before been proved in the prerogative court of *Can-*

A prerogative probate when there are no *bona notabilia* is not void, but only voidable.

Canterbury, and by reafon thereof they *extorfive exigebant* of the faid *Thomas Hollier* 40*s*. On not guilty pleaded, there was a verdict for the king, generally.

The defendants now moved in arreft of judgment, and offered feveral exceptions, relating either (1.) to the merits, or (2.) to the form of the indictment.

As to the merits two things were infifted on:

1*ft*, That it not appearing there were any *bona notabilia*, the prerogative probate was *ipfo facto* void, and confequently the will ought to be proved before the defendant *Loggen*, the teftator dying in the diocefe of *Sarum*. 2*dly*, Admitting it not void, but only voidable, yet the prerogative court having proceeded in a matter wherein they had no jurifdiction, that fhould not hinder the court of *Sarum* from proceeding in a matter within their jurifdiction.

As to the firft point; before the counfel had gone far in their argument, the C. J. ftopped them, and declared, that it was not now to be contefted, having been often fettled, that fuch prerogative probate is not void, but only voidable. To which the reft of the court agreed.

2. They held that this voidable probate, being the act of the fuperior, had fo far taken away the power of the inferior, that he could not exercife his jurifdiction, till that voidable probate was avoided.

Then it was urged for Dr. *Loggen*, that in this cafe he acted as a judge, and therefore was not indictable for an error in his judgment. *Sed per Parker* C. J. In this cafe he did not act as a judge between party and party, but was only to determine whether he fhould have fuch fees or not; and that rule extends only to judges in courts of record, and not to minifterial officers, as was refolved in the cafe of *Afhby* v. *White*.

The exceptions to the indictment were many.

Firft, For that it only alledged, that the defendants *bene fciebant* that the will had been proved before in the prerogative court; whereas they fhould have fhewn, that it appeared judicially before them. For otherwife this is no more than indicting a judge for giving fentence on one fide, when a matter not appearing to him would have inclined him to the other.

To

To this it was anſwered, that he could not well know it, unleſs it appeared under ſeal; and this being after a verdict, the C. J. ſaid he would intend it ſo, and in fact the ſecond probate was affixed to the ſame copy as the firſt.

Secondly, Another exception was, that this was an indictment at ſeſſions, and the juſtices have no juriſdiction as to extortion. But this was likewiſe over-ruled, for their commiſſion has it in the word *extorſionibus*. 3 *Inſt.* 149. **Juſtices of peace have juriſdiction of extortion.**

Thirdly, For that the indictment had not alledged what was the juſt fee; ſo *non conſtat* that the defendants were guilty of extortion. *Sed per Parker*, it matters not whether 40*s.* was the uſual fee for probate, ſince in this caſe the defendants had no title to any fee at all.

Fourth exception. The defendants offices are diſtinct; and what might be extortion in one, might not be ſo in the other; and therefore the indictment ought not to be joint; as two cannot be jointly indicted for exerciſing a trade without ſerving an apprenticeſhip. *Et per Parker* C. J. This would be an exception, if they were indicted for taking more than they ought; but it is only againſt them for contriving to get money where none is due. And this is an entire charge. For there are no acceſſories in extortion, but he that is aſſiſting is as guilty as the extortioner; as he that is party to a riot, is anſwerable for the act of the others. **Salk. 382. Salk. 334, 595.**

Eyre J. doubted whether the *bene ſciebant* was ſufficient. And quoted a caſe where *habens notitiam* that he was elected conſtable, was held ill. But as to the merits, and all the other objections, the court were unanimous. *Sed adjournatur* as to this laſt, and to conſider what puniſhment to inflict on the defendants. **5 Mod. 129.**

N. B. In the argument of this caſe this diſtinction was taken and agreed to on all hands; that a probate by the dioceſan in the caſe of *bona notabilia* is void, but a prerogative probate when there are no *bona notabilia* is only voidable. *Vide Mod. Caſ.* 146. And *Mich.* 1 *Geo. Cottingham* v. *Loftis*, *Parker* C. J. took this diſtinction. 5 *Co.* 30. *a.* **Probate void, Plowd. 281. voidable, 8 Co. 135. a.**

Dominus

Dominus Rex *versus* Munnery.

Excom' cap' quashed for generality.

A Writ *de excommunicato capiendo* was quashed, being on for not appearing to answer *certis articulis animae suae s[a]lutem morumque correctionem concernentibus.*

Butler *versus* Malissy.

Note to pay jointly or severally how to be declared upon. 2 Ld Raym. 1544. S. P.

CASE upon a promissory note. And the declaration s[et] forth, that the defendant and another did *conjunctim* [e]t *divisim* promise to pay. *Demurrer inde.* And for the defen[d]ant it was insisted, that the action should have been broug[ht] against both. *Et per Parker* C. J. The plaintiff might ha[ve] brought it against either or both, for he had his election. [If] the action had been against both, he should have declared as [he] now does; but that is not right in the action against one onl[y]. For he should have declared generally, that this defendant [by] his note promised to pay, and a several note by two would ha[ve] been good evidence. As where there are several obligor[s] and one only is sued, no mention is made in the declaration [of] the other obligors. Suppose the note had been to pay 50*l.* [or] 100*l.* the plaintiff is intitled to either, but uncertain whi[ch] till he has made his election; for he that speaks in the di[s]junctive says true, if either member of the disjunctive be ver[i]fied; whereas he that speaks in the affirmative, affirms bo[th] parts to be true.

1 Sid. 189, 238.

The plaintiff prayed leave to discontinue on payment of cost[s] which was granted; and at another day moved that he mig[ht] change his rule, to one to amend on payment of costs, b[ut] this last motion was denied.

Forster *versus* Cale.

Whether a man is an attorney or not must be tried by record.

IN case *sur assumpsit* the defendant pleads, that he is an a[t]torney of this court, in abatement, and that he ought [to] be sued as a privileged person. The plaintiff replies, that [he] is not an attorney, and concludes to the country; to whic[h] the defendant demurs. *Et per Whitaker* he ought to have con[]cluded to the record. *Rast. Ent.* 610. *b.* *Aston* 347. *Thom[p]son* 4. 2 *Mod. Cas.* 106.

Agar contra. Those entries are where the privilege of *C.* [B.] was pleaded, which differs from this court; for there is a re[]gular record kept of the attornies, and they must be forejud[ged]

ed, before they can be arrested: whereas here the remedy against attornies is speedier than against other persons, for the first proceeding is a bill left in the office, and after a rule to plead the plaintiff may sign his judgment.

The court inquired of the secondary, who informed them, that anciently there were rolls kept of the attornies; but since the stamp act that method has been disused, and a book stamped, and the names entered in that. And *Whitaker* said that on the trial of the assize for the office of chief clerk the rolls from *Edw.* 3. were produced. *Et per Curiam:* The book which is now kept must be taken as minutes in order to make up the record, and it is a warrant to the proper officer for that purpose, and whenever they are wanted they may be made up. Let that be done regularly for the future. In this case the plaintiff should have concluded to the record, for no man can be an attorney but by the act of the court, and that act must appear by the record, for we will not go to a jury to inquire into our own act. When an attorney is struck out, the rule is, *quod extraponatur e rotulo attorn' et clericorum hujus cur'. Judic' quod billa cassetur.*

Between the Parishes of Teelby *and* Willerton.

THE justices remove a certificate woman being *likely* to become chargeable. *Et per Curiam:* By 8 & 9 *W.* 3. *c.* 30. she is not removeable till she *actually* becomes chargeable; and the order was quashed. In another order the justices adjudged, that a person *may* become chargeable. *Et per Curiam:* This is not sufficient, for the statute only enables the justices to remove persons likely to become chargeable, for a man of the greatest estate may possibly one time or other become chargeable, though it is very unlikely; and is such a person removeable? There is as much difference in this case between *may* and *likely*, as between a possibility and a probability.

Certificate-men not removeable till actually chargeable. So held Mich. 5 Geo. Parishes of Brocton *and* Eastwoodhay. So Salk. 530. *May become chargeable*, ill in an order of removal. 2 Mod. Cas. 51. Salk. 491. Sess. Cas. 124.

Dominus Rex *versus* Turner.

THE defendant being assessed towards the poor's rate for his tithes as vicar, appealed to the sessions, where he is absolutely discharged. *Et per Curiam:* As vicar he is chargeable by 43 *Eliz.* and the sessions has only power to moderate, but not discharge. And the order of sessions was quashed.

Vicar chargeable to poor's rate. Salk. 483, 524.

Vandeput

Vandeput *versus* Lord.

Grantee of reversion before 4 & 5 *Annæ* cannot bring covenant without attornment. 2 Lev. 155. *Sed vide* the case of Woodward *and* Marshall, Mich. 8 W. 3. B. R. (which is shortly put in Salkeld 82.) where it was said, that the grantee might bring covenant, but not debt or distrein before attornment. 1 Lev. 259. *Sed N. B.* That was a grantee by fine.

COvenant by the plaintiff as assignee of an executor of a assignee, who by many *mesne* assignments came to the pos session of a reversion of a term of years granted in 1624, by th mercers company, reserving rent; and sets forth the lease b them made, that the lessee made an under-lease for a lesser term wherein the lessee covenanted to leave the premisses in repai and that then the first lessee granted the reversion to *A.* wh granted it over, till it came to the plaintiff, who as assignee c that reversion brings covenant against the defendant as assigne of the second lessee, the under lease being expired, and assign the breach in not leaving the premisses in repair. Judgment b default, *et inquiratur de dampnis.*

Reeve moved in arrest of judgment for that the plaintiff ha not shewn a good title to the reversion, there being no attorn ment set forth on the first grant to *A.* nor on any of the *mes* assignments. And he put the question and argued upon it whether when tenant for years makes an under lease for a lesse term, and afterwards grants the reversion, it passes withou attornment; for this case must be considered as at common law the grant being made long before the late statute. In *Bro. Abr tit. Attornment. pl.* 45. it is said, that such a reversion will no pass without attornment, because of the attendancy of the rent which is the present case. If the statute 32 *H.* 8. *c.* 34. be ob jected, I answer, that the statute only gives a compleat assigne the action, and has no operation so as to make good his title 1 *Inst.* 215. *a.* A grantee by fine cannot bring covenant with out attornment, *a fortiori* a grantee by deed.

Whitaker contra. The case in *Bro.* was before 32 *H.* 8. s that what was necessary at common law is not so since that sta tute. I agree, attornment is necessary on a fine, but why Because the conuzee could compel it by a *quid juris clamat*, whic the grantee of this reversion cannot. In the case of *Sands* v *Brookes*, *Mich.* 5 *W.* & *M. B. R.* it was held that a grantee of reversion of a copyhold without attornment might maintain co venant against lessee. The 32 *H.* 8. was made to assist stranger to deeds, and therefore supplies all circumstances.

Hob. 177.

But further, this is a judgment by default, and aided by th statute for the amendment of the law, which extends all th statutes of jeofailes to judgments by default, in the same man ner, as if there had been a verdict; and no body can say bu that in this case a verdict would have cured the want of settin out an attornment.

Ree

Reeve replied, The case of a grantee of a copyhold doth not come up to this, for copyholders do not claim by deed, but by custom, and therefore no attornment is necessary, as it was before the late statute upon common law conveyances, which is the present case. I agree, a verdict would have cured this defect, because the plaintiff could not have had a verdict unless he had proved an attornment, but as this is a judgment by default, and was not a jeofaile before 4 & 5 *Annæ*, *c.* 16. that statute can have no relation to this case.

2 Mod. Cas. 87. 1 Ven. 109. Salk. 130.

C. J. The reason why the plaintiff is required to set out an attornment is, because his title is not compleat without it, as a copyholder's is. The 32 *H.* 8. gives none but an assignee this action; it doth not enable him to be assignee, but only as such to bring an action. To which *Powys* J. agreed. *Et per Eyre* J. The 32 *H.* 8. is out of the case; for as the plaintiff is not a compleat assignee, we must take it as it stood at common law, and at common law such a grantee of the reversion as the plaintiff is could not maintain an action of covenant. *Jones* Sir *W.* 243. *Jones* Sir *Tho.* 217, 232. *Moor* 527. This was not a jeofaile, so not helped by 4 & 5 *Annae.* And *Prat*, J. said, that the question was no more, than whether the statute 32 *H.* 8. gives the action to him who has not the reversion, for without attornment it passed not. For these reasons the judgment was arrested.

Lane *versus* Santeloe.

At Nisi prius *in* Middlesex, coram King, *C. J.*

CASE for a malicious prosecution of an indictment of felony, whereof the plaintiff was acquitted, was brought against the prosecutor and the justice who committed; and the jury gave 200*l.* damages against the prosecutor, and 20*l.* against the justice, and the C. J. directed the verdict to be taken accordingly.

Different damages given.

Westbrooke *versus* Strutville.

Coram King, *C. J. in* Middlesex.

ON Not guilty in trespass for an assault, the defendant gave in evidence his marriage with the plaintiff, to encounter which she proved a former marriage to one *Westbrook*, who was alive at the time of her second marriage. *Pro defendente* it was insisted, the plaintiff ought not to give felony in evidence to support her action; but this was over-ruled, and she obtained a verdict, her marriage with the defendant being void *ab initio*.

Wife *de facto* only may bring trespass for assault by husband.

See *post* 480.

Strutville

Strutville *versus* ——

Coram Parker *C. J. in* Middlesex.

Wife de facto a servant.

WHERE a woman marries a second husband living the first, and the second not privy; as to what she acquired during the cohabitation, the C. J. said he would esteem her as a servant to the second husband, who is intitled to the benefit of her labour.

Williams *versus* Lady Bridget Osborne.

Before the Delegates at Serjeants Inn, January 22, 1717.

Of the suppletory oath.

THE question below was, whether Mr. *Williams* was married to the lady *Bridget Osborne*; the minister who performed the ceremony having formerly confessed it extrajudicially, but now denying it upon oath. So that there being variety of evidence on both sides, the Judge upon the hearing the cause required, according to the method of ecclesiastical courts, the oath of the party, which the civilians term the suppletory oath, that he was really married as he supposes in his libel and articles. The accepting this oath (as was agreed on both sides) lies *in arbitrio judicis*, and is only used where there is but what the civiliians esteem a *semiplena probatio*; for if there be *plena probatio*, it is never required; and if the evidence does not amount to a *semiplena probatio*, it is never granted, because this oath is not evidence strictly speaking, but only confirmation of evidence; and if that evidence doth not amount to a *semiplena probatio*, the confirmation of it by the party's own oath will not alter the case.

Upon admitting the party to his suppletory oath, the Lady *Bridget Osborne* appeals to the Delegates. So that the question now was not upon the merits, whether there really was a marriage or not, but only upon the course of the ecclesiastical courts, whether the Judge in this case ought to have admitted Mr. *Williams* to his suppletory oath, as a person that had made a *semiplena probatio* of that which he was then to confirm.

The questions before the Delegates were two: 1. Whether the suppletory oath ought to be administred in any case, to enforce a *semiplena probatio*? 2. Admitting it might, whether the evidence in this case amounted to a *semiplena probatio*, so as to intitle Mr. *Williams* to pray that his suppletory oath might be received?

1. As

1. As to the firſt, it was argued to be againſt all the rules of the common law, that a man ſhould be a witneſs in his own cauſe. It is not allowed in the temporal courts in any caſe but that of a robbery, which being preſumed to be ſecret, the party is admitted to be a witneſs for himſelf. In the temporal courts no man can be examined that has any intereſt, though he be no party to the ſuit, for *minima exceptio tollit ſacramentum juratoris.* On the other ſide many authorities and precedents were cited out of the civil law, to prove this practice of allowing the ſuppletory oath. And therefore the court held, that by the canon and civil law the party-agent, making a *ſemiplena probatio*, was intitled to pray that his ſuppletory oath might be received. And though it be againſt the rules of the common law, yet this being a cauſe of eccleſiaſtical conuzance, the civil and not the common law is to be the meaſure of their proceedings, and therefore this practice being agreeable to the civil law, is well warranted in all caſes where the civil law is the rule; and the exerciſe of it lies *in arbitrio judicis.*

2. It being therefore eſtabliſhed, that a perſon making *ſemiplena probatio* is intitled to his oath; the next queſtion was, what is, according to the notion of the civilians and canoniſts, a *ſemiplena probatio.* With them it was argued on behalf of the lady, that nothing is eſteemed as a *plena probatio*, unleſs there be two poſitive unexceptionable witneſſes to the very matter of fact, as to the marriage. That a *ſemiplena probatio*, which is the next degree of evidence, is what is affirmed by the oath of one witneſs as to the principal fact, and confirmed by concurrent circumſtances.

And *1ſt*, It muſt be *per unum teſtem.* *2dly*, Evidence that concludes neceſſarily, and not by preſumption. *3dly*, That has no preſumption to encounter it; and *4thly*, The witneſs muſt be *honeſta perſona.*

That matrimonial cauſes require the greateſt certainty; and where that is the ſole queſtion, the proof ought to be fuller, than where it comes in by incident, as on granting adminiſtration.

To this it was anſwered on the other ſide, that *ſemiplena probatio* implies no more than what the common lawyers call preſumptive evidence; and that is properly called preſumptive evidence, which has no one poſitive witneſs to ſupport it, but relies only on the ſtrength of circumſtances. And when there is one witneſs, who depoſes directly to the principal fact, this immediately ceaſes to bear the name of preſumptive, and aſſumes that of poſitive evidence. And that which in the temporal courts paſſes for poſitive evidence, is the ſame degree of

evidence with the *plena probatio* of the canonifts and civilians. The fuppletory oath does *ex vi termini* import, that there has been no one pofitive witnefs to the principal fact; and he that demands to be admitted to take his oath, does thereby admit that he has produced no conclufive evidence to the point in iffue, and therefore *pars ipfa fungitur officio teftis.*

There is no fixing the bounds of a *femiplena probatio*; for in many cafes circumftances may overbear pofitive evidence, and then if thofe circumftances fhould not be efteemed to amount to a *femiplena probatio*, when the pofitive evidence would exceed it; that would be to overthrow the pofitive evidence, by that which is not fo ftrong.

Semiplena probatio therefore they concluded to be, that degree of evidence which would incline a reafonable man to either fide of the queftion; and implies in the notion of it, that a pofitive witnefs has not depofed to the principal fact. And in this cafe, though there was no pofitive conclufive evidence, but only fuch as depended on circumftances, as confeffions, and letters, and unufual familiarities; yet the court thought it amounted to a *femiplena probatio*, and confequently that the dean of the Arches had done right, in admitting Mr. *Williams* to his fuppletory oath; and therefore they difmiffed the appeal with 150*l.* cofts. *N. B.* Before this appeal upon the point of the *gravamen*, the judge below had given fentence *in principali* in favour of the marriage, and the appealing upon this collateral point was only to protract the time. To obviate this, the court of Delegates, inftead of remitting the caufe to the Arches, retained it *ad inftantiam partis*, and 11 *December* 1718, heard it upon the merits, and confirmed the former fentence.

Sir Harry Haughton *verfus* Starkey. In Scacc'.

What cofts are to be given in prohibition.

AFTER judgment for the plaintiff in prohibition, the queftion was, what cofts ought to be allowed, the ftatute of 8 & 9 *W.* 3. *c.* 11. giving cofts *in fuits upon prohibitions*; and whether they fhould be computed from the firft motion, or only from the declaration, was the doubt. Upon fearch it was found to be the courfe of all the courts, to tax only from the time of declaring, except in two inftances. *Eads* v. *Jackfon*, *B. R.* 2 *Geo.* and *Brown* v. *Turner et al'* in *C. B.* where they were allowed from the firft motion. And of this opinion were all the judges, as Baron *Fortefcue* informed me. And all the officers were directed for the future to allow the cofts of the firft motion. And afterwards, *Hil.* 12 *Geo. B. R.* inter *Swetnam et Archer*, it was ftated in the fame manner, and agrees

agreed to be the uniform practice ever ſince; and *Paſ.* 1 *Geo.* 2. between Sir *Thomas Bury* and *Croſs*, the ſame doubt was raiſed by a new maſter, and the court ordered coſts from the firſt motion.

Dominus Rex *verſus* Inhabitantes de Haughton.

UPON a ſpecial order the caſe was ſtated, That about five years ſince one *John Evans* was hired into the pariſh of *Haughton* from *Aſh Wedneſday* to *Chriſtmas*; that at *Chriſtmas* he went home to his father, who lived in another pariſh, took his clothes with him, and ſtaid a week. That then he returned to *Haughton*, and hired himſelf to, and ſerved the ſame maſter eleven months. Then he went home again to his father for a week, and returned, and was hired and ſerved the ſame maſter other eleven months. That then by agreement between the maſter and him, and to avoid a ſettlement in *Haughton*, he went home to his father for a week, and afterwards ſerved the ſame maſter for five weeks. And there being ſo many hirings and ſervices, the juſtices adjudge the ſettlement in *Haughton*. Several hirings and ſervices for 11 months give no ſettlement. Seſſ. Caſ. 137.

Denton, *Reeve* and *Foley* moved to quaſh this order, there being no actual hiring and ſervice for a year, both which the ſtatute of 3 & 4 *W.* & *M.* *c.* 11. requires. *Mich.* 9 *Ann. Paroch. Rudſwicke* v. *Dunſole*, *Salk.* 535. there was a hiring for a quarter of a year, and afterwards for half, and then for another half year, and a ſervice for all; but this was held to be no ſettlement. *Hil.* 10 *W.* 3. *Paroch*, *Overton* v. *Steventon*, there was a hiring and ſervice for half a year, then a hiring for a whole year, and a ſervice for half; and this was held to be a hiring and ſervice for a year, and the ſettlement in that pariſh. So *Paſ.* 1 *Geo. B. R. Rex* v. *Inhabitantes de Brightwell* in *Berks*, there was a hiring and ſervice from three weeks after *Michaelmas* 1712, to *Michaelmas* 1713, then a hiring to the ſame maſter for a year, and a ſervice for eleven months, and theſe two hirings and ſervices were held to gain the ſervant a ſettlement. *Paſ.* 1 *Geo. Paroch. Pepper Harrow* v. *Frencham*, a hiring and ſervice from 3 *October* to *Michaelmas*, and the ſervant at the maſter's requeſt ſtaid ſo long after as brought the year about; but this was held no ſettlement. *Mich.* 12 *Ann. Paroch. Horſham* v. *Shipley*, there was a hiring from 19 *February* to *May-tide*, from thence to *Lady-day*, then to *May-tide* again, then to *Lady-day*, and then to the next *May-tide*; but there being no contract for a year, the court held it no ſettlement. Forteſc. Rep 316.

Hawkins contra. A fervant, whilft fuch, is not removable by any act, when a man is hired for a year in one parifh, and ferves the laft quarter with his mafter, who removes into another parifh, yet the fervant gains a fettlement, as has been adjudged, notwithftanding the act fays, *a hiring and fervice for a year in any parifh. Mich.* 1 *Geo. Paroch. St. George* v. *St. Catherine*, where the mafter removed at half a year's end. The ftatute fays, *apprentices bound out by indenture*; and yet it has been extended to thofe bound out by deed poll. So the ftatute of *Gloucefter* as to wafte has been extended beyond the letter, rather than it fhould be evaded. In the prefent cafe it plainly appears, that this was a contrivance from the beginning, to exempt this parifh, by fending him away at eleven months end.

By 31 Geo. 2. c. 11. apprentices gain a fettlement, tho' not bound out by indenture, provided the deed be ftampt.

Foley. He needed not to go away, to avoid that which he could not have gained by ftaying.

C. J. This is plainly a defign to fave this parifh, and I fuppofe all the parifhioners have agreed never to hire any fervant for a year. The ground of the ftatute relating to fervants was, that a perfon who had ftrength of body enough to hire himfelf out for a year, would when that year is expired be able to fupport himfelf; and the fame reafon holds in the cafe of apprentices. I am afraid we cannot interpofe in this cafe, but it is proper the legiflature fhould.

Pratt J. We muft take the law as it ftands, and follow former refolutions; for the feffions have ever fince for the moft part acted purfuant to thofe refolutions; and if we fhould do otherwife, it will introduce the utmoft uncertainty and confufion; and little refpect will be paid to our judgments, if we overthrow that one day, which we refolved the day before. The ftatute exprefsly requires a hiring and fervice for a year; and it is admitted that if there was but one hiring and fervice for eleven months, that would give no fettlement; and why any fubfequent hirings of the fame nature fhould gain him one, I cannot imagine. The reafon of hiring fervants at firft for eleven months only is, becaufe the fervant may prove idle and good for nothing, and the mafter, as a prudent man ought to do, avoids bringing a charge upon the parifh, till he has had experience of the diligence and fidelity of his fervant: And when he has had eleven months experience of his diligence and fidelity, then if he hires him a fecond time, that is grounded upon his good fervice during the former hiring, but ftill the fecond hiring muft be as full, as if the firft hiring were out of the cafe. And if the firft hiring were out of the cafe, then the fecond would ftand in the fame parity of reafon with what I men-

I mentioned before, a single hiring and service for eleven months, which it is agreed will give no settlement.

If there was any fraud, the justices should have examined into it. We cannot judge of the fact, but the law upon the fact. 1 *Ven.* 310. Demand and refusal is evidence of a conversion to a jury, but not to the court. 1 *Roll. Abr.* 523. 10 *Co.* 56. *Hob.* 187. 1 *Ven.* 401. 1 *Sid.* 127. *Hutt.* 10. *Salk.* 531. If that case of the parishes of *Overton* and *Steventon* was open again, I should not readily go into that opinion. See *Bur.* Settl. Cas. 60. *accord.*

The court took time to consider of it, and at the end of the term they held, that as the law now stands, the several hirings and services that were stated could give no settlement. They said it would be dangerous to depart from the * words of the statute, and if they once did, they should never know where to stop. Wherefore the order was quashed.

* See 1 Bur. Rep. 371, 495. See also post. 143. S. P.

Eafter Term.

4 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Juftice.*
Sir Littleton Powys, *Knt.* } *Juftices.*
Sir Robert Eyre, *Knt.*
Sir John Fortefcue Aland, *Knt.*
Nicholas Lechmere, *Efquire, Attorney General.*
Sir William Thompfon, *Knt. Solicitor General.*

Memorandum: This term the Lord Chief Juftice *Parker* was made Lord Chancellor, and Mr. Juftice *Pratt* fucceeded him as Chief Juftice, and Mr. Baron *Fortefcue* came down into the King's Bench, and was fucceeded by Sir *Francis Page* the King's Serjeant, and Sir *Edward Northey*, Knt. was removed from being Attorney General, and *Nicholas Lechmere*, Efquire, was made Attorney in his room.

Anonymous.

Sunday a day in rules, unlefs the firft or laft. Salk. 624.

THE writ was returnable 30th *January*, and the bail-bond affigned the 4th of *February*, between which and 30th *January* a *Sunday* happened. *Et per Curiam:* It is well affigned, for *Sunday* is to be reckoned as one of the four days (there being no more allowed in actions laid in *London* or *Middlefex*.) And fo it is in rules to plead, except the firft or laft day happen upon a *Sunday*; with this difference, that if the rule be given upon a *Sunday* it goes for nothing, but if it expires upon a *Sunday*, the defendant has all the next day to plead in.

Lanquit

Lanquit *verſus* Jones.

Rule on executor to return fieri facias de bonis eccleſiaſticis.

THE Sheriff returned to a *fieri facias*, that the defendant is *clericus beneficiatus nullum habens laicum feodum* within his bailiwick; whereupon a *fieri facias de bonis eccleſiaſticis* iſſued, directed to the late biſhop of *Sarum* in one cauſe, and in another between the ſame parties directed to the preſent biſhop. And upon affidavit that the debts were levied thereupon, the court made a rule upon the executors of the firſt biſhop, to return the firſt writ, and upon the now biſhop to return the ſecond.

Drake *verſus* Taylor.

Where the queſtion is whether the rector or vicar be intitled to tithes, no prohibition lies.

THE vicar libels for tithes of turnips, and lays his title to them by preſcription and endowment. The defendant pleads that there is a rectory impropriate, and that time out of mind the rector has taken tithes of turnips. And laſt term he moved for a prohibition *pro defectu triationis*, and obtained a rule *niſi*. And now *Reynolds* Serjeant came to ſhew cauſe againſt a prohibition, for that turnips are a late improvement in *Norfolk* (where the matter ariſes), and quoted 2 *Roll. Abr.* 310. *Z.* 5. 1. 2. And where the matter is originally of eccleſiaſtical conuzance unmixt with any temporal ingredient, no prohibition lies. The vicar is *prima facie* intitled to nothing, unleſs he ſhews a right either by preſcription or endowment. Theſe endowments are of an eccleſiaſtical nature, and ſo is the extent of them. For anciently and until the Statutes of 15 *R.* 2. *c.* 6. and 4 *H.* 4. *c.* 12. the ordinary endowed the vicarage at his diſcretion. In 2 *Brownl.* 36. it is ſaid and agreed, that if there be a parſonage impropriate, and a vicarage endowed, and there be any difference between them, it ſhall be tried and determined by the ordinary. *In Scaccario et in C. B.* this prohibition has been denied.

Yorke contra. That rule which has been laid down, will not be inſiſted upon now-a-days, for the clergy will not pretend to be exempted from the temporal juriſdiction merely becauſe they are eccleſiaſticks. But in this caſe both parties are not eccleſiaſticks, for the libel is againſt the pariſhioner, and it lays a cuſtom which is denied and muſt be tried, and that has always been good ground for a prohibition. We do not pray it for defect of juriſdiction, but want of trial of the preſcription, which is what the vicar grounds himſelf upon in making his title to the tithes; and the queſtion is not upon the

G 4 endowment,

endowment, though I admit the prescription supposes an endowment.

C. J. Though both parties are not ecclesiasticks, yet the thing in controversy belongs either to one ecclesiastick or another, for either the rector is intitled to the tithes or the vicar, and what matter is it to the parishioner who has them? for he can only pay them to one. This is properly a dispute what belongs to the vicar upon the endowment, and that evidence which will intitle him to a sentence below, will not enable him to recover here, and therefore I am against a prohibition. To which *Powys* and *Eyre* Justices agreed. *Et per Pratt* J. If we should grant a prohibition in order to try the custom, and it should be found against the custom, yet that will not determine the question upon the endowment; and therefore we ought not to draw them out of that court, which may properly determine the whole matter. And besides in the spiritual court fifty years makes a prescription, though it will not here. The rule for a prohibition was discharged.

Wallis *versus* Scott.

Where a special request is necessary to be alleged, and where not.

THE plaintiff declares, that the defendant, in consideration the plaintiff would make him a set of sails worth 45 *l.* promised to pay so much for them upon request; and avers, that he made the *said sails*; and the defendant although often requested refuses to pay. *Demurrer inde.* And *Branthwayte* Serjeant *pro defendente* argued, that this being a special contract, the plaintiff must shew a performance of all on his part, which he has not done; for he has not averred that he made the sails worth 45 *l.* and if they were not worth it, the defendant is not chargeable.

1 Lev. 48. 2 Lev. 198. Lutw. 231. Poph. 160. Hutt. 2, 42, 73. Lat. 93. Lev. 69. Lat. 208, 209. 1 Sid. 305.

Secondly, The action being founded upon the breach of contract, there ought to be a special request laid. For this differs from the cases where there is a precedent debt or duty whereon to ground the promise, for there I admit the action is a request. 2 *Cro.* 183. The defendant, in consideration the plaintiff being an innkeeper would entertain the defendant's commissioners, promised to pay for their lodging and diet upon request; and there being nothing but the general *licet saepius requisit'*, judgment was arrested upon that distinction, between a collateral contract for a thing *in fieri*, and a precedent debt or duty. And to the same purpose is 2 *Cro.* 523. In 2 *Saund.* 32. *Assumpsit* on mutual promises to perform an award, or pay each other 40 *l.* upon request, and in an action for the 40 *l.* the declaration was held ill, because no request was alleged, and the former

former cases and differences were agreed. Here is no money to be paid till two things are done, neither of which appear, 1. the making the sails of such a value, and 2. a request to pay for them.

Yorke contra. In actions upon the case the plaintiff may lay it as he can prove it, and is not obliged to a general *indebitatus assumpsit.* The value is part of the description of the sails, and therefore when we aver we made the aforesaid sails, *velaturas praedictas*, that takes in the whole description. As to the request, the *licet saepius requisit'* is sufficient. But if not, yet the want of a special request ought to have been shewn for cause of demurrer. The cases in *Croke* can never be law, for they are after a verdict, when the court will intend a request proved, and so is *Pop.* 160.

Branthwayte replied. It is admitted that the value ought to be averred, and the only question now is, whether it be or not. *Praedict'* will not be a sufficient averment. In *Yelv.* 36. Trespass for taking goods *a persona* of the plaintiff, and judgment arrested for the insufficiency of averring the property. These cases as to the request, being after a verdict, the argument holds *a fortiori* in this case, which is on a demurrer. The general request as alleged may be since the action brought, and this at most is but an executory promise.

Powys J. (*absentibus Parker et Pratt*) thought the *praedictas velaturas* was sufficient. *Et per Eyre* J. I do not think the value needed be alledged; but if it need, yet the *praedict'* takes it in, for if the value be part of the description, then it is averred that the plaintiff made such a set of sails as was agreed upon (that is) a set of sails which answers every part of the description.

Where notice or a request are by law necessary, there the general averment will not be sufficient; but it must be particularly set forth, that the court may judge whether the notice or request were sufficient. But in this case I take it no request was necessary, for on the making the sails the money immediately becomes due. If I promise a taylor, that in consideration he will make me a suit of cloaths, I will pay him so much; there needs no request, for as soon as he has done his part, there is a duty vested in him. And this differs from the cases where the payment is to be to a third person, or where an award directs a request.

Afterwards, the court being full, *Branthwayte* mentioned *Cro. Eliz.* 773. 91. *Hutt.* 107. And *Yorke* quoted *Yel.* 66, 121. 3 *Bulst.* 258. 2 *Cro.* 639. And the former cases of 2 *Cro.* 183, 523. were denied *per Eyre* J. and judgment given for the plaintiff.

Dominus Rex *versus* Inhabitantes de Ivinghoe in Com' Bucks.

Where there is an hiring for a year, and a service for part to a stranger, yet if there be no dissolution of the first contract it is a settlement. Fortesc. Rep. 317.

ON a special order of sessions the case appeared to be, That one *Nicholas Young*, being legally settled in the parish of *Cholesbury*, was at *Michaelmas*, 1715, hired into the parish of *Ivinghoe*, by *John Knight*, to serve him as a shepherd till *Michaelmas* following. That he entered upon the service, and continued with *Knight* till *Lady-day*, who then paid him half a year's wages, and left the farm to one *Smith*, who entered and took all the stock and servants, and in harvest time took *Young* off from keeping sheep, and set him to harvest work, for which he paid him 5 *s.* extraordinary, and at the year's end paid him the other half year's wages. That *Knight* when he left the farm never told *Young* he was no more his servant, nor were there any transactions between them two towards dissolving the contract; neither did *Young* ever make any new contract with *Smith* for the last half year. And the justices adjudge the settlement in *Ivinghoe*, where the hiring and service were.

Denton moved to quash the order. Because to make a settlement there must be both a continuance of the contract, and service; both which were broke off at the half year's end. *Mich.* 9 *Annae*, *Paroch' Rudswick et Dunsfole*, *Salk.* 538. There was a hiring and service for a quarter of a year, then for half a year, and afterwards for another half year, all which were held to give no settlement.

Ld. Raym. 1512.

Yorke. By 8 & 9 *W.* 3. *c.* 30. it is required, that the party continue in the same service for a year. There must be an identity of the service, it must appear to be the same master, which this is not, and here is an alteration of the wages. The court will not consider what is most for the benefit of the servant, but which is the proper parish to be charged; it is all one to the servant, where he is settled.

Reeve contra. It being expressly stated, that there was no new contract, the first must be taken to have continuance all the year. And if *Smith* had not paid *Young* the last half year's wages, no doubt but as this case stands he might have come upon *Knight* for them. The 5 *s.* shew he was *Knight*'s servant all along, for otherwise *Smith* had no occasion to give him that extraordinary pay. The statute does not require an identity of the contract, for *Hil.* 10 *W.* 3. *Paroch' Overton et Steventon*, a hiring and service for half a year, and then ahiring for a whole year, and a service for half, was

Fortesc. Rep. 316.

held

held to gain a settlement. So *Pasch.* 1 *Geo.* *B. R.* *Rex* v. *Inhabitantes de Brightwell in Com. Berks*, there was a hiring Ld.Raym.1512. and service from three weeks after *Michaelmas* 1712 to *Michaelmas* 1713, then a hiring to the same master for a year, and a service for eleven months; and this was held a good settlement. The statute 3 & 4 *W.* & *M.* *c.* 11. says, that a binding and inhabitation shall gain a settlement, so that by the words a binding is required; and yet *Trinity* 13 *W.* 3. *B. R.* *Rex* v. *Inhabitantes de Eccles in Com' Norf'*, it was held, that if the master to whom the binding was, assigns his apprentice over to another, a bare inhabitation forty days with the assignee gives a settlement. In this case there is a hiring and service for a year in the parish of *Ivinghoe*, and that is sufficient.

Lee. By 13 & 14 *Car.* 2. *c.* 12. forty days inhabitation gave a settlement. But it being found, that diseased and disorderly persons often came into parishes and staid out the time, it was thought proper by the statutes of 3 & 4 and 8 & 9 *W.* 3. to require a hiring and service for a year. And this was thought a good remedy, because it was supposed no body would incumber themselves with a sickly or disorderly person for a whole year, who perhaps would have dispensed with them for forty days. And it is not presumed, that a person having ability of body enough to serve a year, will become chargeable; and he is looked on as bringing so much substance into the parish. I agree the word *same* in the latter statute is a word of relation, but it will be satisfied by referring it to *the same place*. Those statutes have always had a liberal construction, as before 3 & 4 *W.* and *M.* *c.* 11. that bearing offices in a parish amounts to notice. *Show.* 12. So the statute says, *any unmarried person having no child*, and yet a person having a child which was grown up, and no incumbrance to him, was held to be within the statute. So *Pasch.* 10 *Annae*, *Regina* v. *Paroch' de Aldenham*, and *Mich.* 1 *Geo.* *St. Saviour's*, *Southwark*, marrying within the year was held no hindrance of the settlement. *Salk.* 527, 529.

Yorke. That case is within the very words, for the statute speaks only of persons unmarried at the time of the hiring.

C. J. The statute requires two things; a hiring, and a continuance in the same service for a year. There can be no doubt but that in this case there is a compleat and perfect hiring for a year; but the question turns upon the service. Half of it was actually a service to *Knight*, and the rest in fact was a service to *Smith*; but there being no new contract with *Smith*, nor any dissolution of the first contract with *Knight*; it seems considerable, whether the whole shall not be taken to be

be a service to *Knight*. As if I lend my servant to a neigh bour for a week, or any longer time; and he goes accord ingly, and does such work as my neighbour sets him about Yet all this while he is in my service, and may reasonably b said to be doing my business.

If the first contract be not discharged, it must have a con tinuance, and under it the servant is intitled to demand hi wages of the first master. And the 5*s*. given him by *Smi* is no argument to the contrary, no more than if, in the ca I put before, my neighbour had given my servant a gratui for his extraordinary trouble. What agreement there w between *Knight* and *Smith*, *non constat*, but here is no act do by the servant that shews his consent to change his maste And therefore I take this to be a service for the whole yea pursuant to the first contract, and consequently the settleme is at *Ivinghoe*, where the service was.

Ante 83. *Powys* J. The private reason that we went upon in *The Ki* v. *The Inhabitants of Haughton*, where it was held that seve ral hirings and services for eleven months gained no settl ment, was, because if we should once get out of the statut there would be no end, and by the same reason that we abai ed one day, we might abate two, *et sic in infinitum*. I thin in this case the settlement is in *Ivinghoe*.

Salk. 479. *Eyre* J. And so do I. This is a contract for a year betwee *Knight* and *Young*, and not to be dissolved during the yea without both their consents. There is actually no consent c one side, and but an implied consent on the other. It weig nothing with me, that *Smith* paid the last half year's wage for I look upon him only as a person to whom the serva was lent, and there is no doubt but that *Young* might hav demanded the wages of *Knight*. The paying the 5*s*. is far from being an argument that the contract was dissolve that it is to me a strong evidence of its continuance; fo when *Smith* goes to set him about harvest work, no says h I was hired to be a shepherd, and had small wages accor ingly; and thereupon the other agrees to give him 5*s*. a equivalent for the hardness of the work.

Fortescue J. The difficulty arises upon the word *same*, whic may extend to master, parish, and business. And taking it i those senses, this case comes within the words of the statute and there can be no doubt but that it comes within the rea son of it, for he is no more likely to be chargeable nov than if he had actually served *Knight* all the year. Upon th reasons which have been given, I think, here is the same ma ter, the same sort of service, in the same parish, and a con tinuance of the contract throughout the whole. The ord was confirmed.

Domini

Dominus Rex *versus* Motherfell.

UPON a motion for a new trial, the judge certified the special matter in writing, and the court refused to hear any affidavits of what passed at the trial, looking upon the certificate of the judge, who was an indifferent person, to be of a much higher nature than the oath of the party interested, and therefore ordered the counsel to take the fact as it was stated by the certificate, and not argue about the fact, but the law upon the fact. And the question being, whether a particular matter offered in evidence was well over-ruled by the judge, the court said, that if he had rejected that which was good evidence, it would be ground for a new trial; but if the matter offered was not legal evidence, then the first verdict ought to stand. And as to that the fact was, that on an information in nature of a *quo warranto* the prosecutor produced in evidence a book, which appeared to be only minutes of some corporate acts ten years ago, all written by the prosecutor's clerk, who was no officer of the corporation. And this being opposed by the other side, as having never been kept amongst, or esteemed as one of the corporation books, in which the entries were always made by the town clerk, and there being some suspicion that this book was not genuine, the Judge, before he admitted it to be read, required an account where it been kept for these ten years, and whether any body had seen it before, which the prosecutor not being able to give him any satisfaction in, he rejected it. *Et per Curiam*, Corporation books are generally allowed to be given in evidence, when they have been publickly kept as such, and the entries made by the proper officer; not but that entries made by other persons may be good, if the town clerk be sick or refuses to attend, but then that must be made appear. Whoever produces a book, must establish it, before he delivers it in. We often make people, when they produce deeds, give an account where they have been kept, and how they came by them. Therefore we are of opinion, this evidence thus offered was well over-ruled, and consequently there must be no new trial.

What corporation books may be given in evidence.

Hunt's case.

THE court granted a *mandamus* on 1 *Geo.* against mutiny and desertion, directed to the justices of peace, for them to compel the treasurer of the county to reimburse a constable the extraordinary charges he had been at in providing carriages on the expedition into *Scotland*.

Mandamus.

Between

Between the Parishes of Horncastle *and* Boston.

What is a good certificate within 8 & 9 W. 3. c. 30. Fortesc. Rep. 301.

A. Being legally settled in *Boston*, came into *Horncastle* as certificate man; and the justices, thinking the certifica not sufficient, made an order to remove him back to *Bost* And now, upon motion to quash the order, it appeared th the certificate was signed by the churchwardens or overseers, 8 & 9 *W.* 3. *c.* 30. directs; and that it was attested by tw as witnesses, who were justices of the peace. The statute re quires it to be attested by two witnesses, and allowed by two ju tices of the peace. And *Cheshyre* insisted, that this was a bett certificate than such a one as is mentioned in the statute, for t attestation of the signing it is only to satisfy the justices, th it is the hand of the parish officers; and nothing can be satisfactory to them, as what they see. And it is not re quisite, that there be four distinct persons, two to attest, a two to allow; but the justices that allow the certificate ma act in both capacities. To which the court agreed, when it ap peared they took upon them to act both as witnesses and ju stices; but here it only appeared they subscribed as witness for there are no words of allowance. If this should be he good, the justices may be drawn in to sign as witnesses, wh perhaps they do not so much as know what the instrument i and never imagined what they did would pass for an allowanc The certificate was held void, and the order confirmed.

Frost *versus* Wolveston. In C. B.

Infant declares the uses of a fine to be suffered at full age, then he may declare other uses.

AN infant covenants to levy a fine by such a time to su uses. Before the time he comes of age, then the fi is levied, and by another deed, made at full age, he declares to be to other uses. The court held the last deed should that which should lead the uses.

Loyd *versus* Lee.

At nisi prius *in* London, coram Pratt *C. J.* de B. R.

Forbearance no consideration where no cause of action before.

A Married woman gives a promissory note as a *feme sol* and after her husband's death, in consideration of fo bearance, promises to pay it. And now in an action agai her it was insisted, that though she being under coverture the time of giving the note, it was voidable for that reason yet by her subsequent promise, when she was of ability to mak

promise, she had made herself liable, and the forbearance was a new consideration. But the C. J. held the contrary, and that the note was not barely voidable, but absolutely void; and forbearance, where originally there is no cause of action, is no consideration to raise an *assumpsit*. But he said it might be otherwise where the contract was but voidable. And so the plaintiff was called. *Vide* 1 *Ven.* 120, 159. *Salk.* 29. *Yel.* 50, 184. 2 *Saund.* 261. *Hob.* 18, 216. *Pop.* 152, 177. *Lat.* 21, 141.

Anonymous.

At nisi prius *in* Middlesex, coram Pratt *C. J.*

THE question in ejectment being parcel or not parcel, a survey was offered in evidence on the plaintiff's side, which was taken by one under whom the lessor claimed, wherein the lands in question were included. But this being an act to which the defendants were not privy, and consequently not bound, and it being dangerous, and tending to encourage people to take more than their own into a survey, the Chief Justice rejected it.

Survey where evidence.

Stafford *versus* the City of London. In Canc'.

THE plaintiff being a co-lessee with *A.* brought his bill to have the rent apportioned on a partial eviction. And because the other lessee was neither plaintiff nor defendant, (for if he refused to be a plaintiff he might be made a defendant) the bill was dismissed with costs. And instances were cited where bills have been dismissed for want of parties, as well as where causes have been put off only.

One lessee alone cannot come into *Canc'* for an apportionment. S. C. 1 P. Will. Rep. 428. 2 Eq. Cas. Abr. 166. pl. 9.

Trinity Term,

4 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Justice.*

Sir Littleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Justices.*
Sir John Fortescue Aland; *Knt.*

Nicholas Lechmere, *Esquire, Attorney General.*

Sir William Thompson, *Knt. Solicitor General.*

Dominus Rex *versus* Inhabitantes de Almanbury in com' Ebor'.

Order upon appeal without saying *of the party grieved* good. Fortesc. Rep. 301.

AN order of two justices is quashed at sessions upon appeal, without saying, *at the appeal of the party grieved.* And this was objected, in order to quash the order of sessions, and compared to the case of a complaint that a man is likely to become chargeable, which has been held ill, because the complaint must be by the churchwardens and overseers. And the case of *Rex* v. *Sir Thomas Putt.* Inquisition at sessions *coram A. et al' sociis suis*, was held ill, for there must be two, and nothing is presumed in a limited jurisdiction. And the court here inclined to quash the order for this fault, till they were informed the precedents were most of them so, and for that reason, and that only, as the C. J. declared, the order was confirmed. *Yelv.* 126.

Waring

Waring *verf.* Dewberry.

THE landlord having arrears of rent due to him dies inteftate. The plaintiff in this action fues out execution on a recovery againft the defendant who was the tenant, and levies the money by fale of the goods. Then adminiftration of the inteftate's goods is committed to *A.* who thereby became intitled to the arrears, and now moved for a rule to have one year's rent out of the levy money purfuant to the ftatute of 8 *Annae*, c. 17. And *Robins* urged, that though he was not adminiftrator at the time of ferving the execution, yet as foon as the adminiftration is committed, it relates to the death of the inteftate, fo that he may bring trefpafs or trover for goods taken between the death of the inteftate and the commiffion of adminiftration. 3 *Lev.* 35. 3 *Mod.* 276. *Salk.* 295. *Sed tota curia praetur Powys J. contra*; for relations which are but fictions in law fhall not diveft any right vefted in a ftranger *mefne* between the inteftate's death and the adminiftration. The ftatute it is true was made for the benefit of landlords, and to prevent the tenant's fetting up a fham execution to defeat him of the rent. He has ftill the fame remedy that he had before, and if he will have the additional remedy, he muft make himfelf capable of it, which the adminiftrator here could not. He could not demand the rent; it not being certain he would be adminiftrator, for the ordinary might refufe, and the fheriff is not obliged to wait and fee if any body comes and demands the rent. He cannot take notice what arrears there are, but if the landlord comes and acquaints him with it, then and not till then he is obliged to fee the year's rent fatisfied before removal of the goods. If it fhould be otherwife, it would be in the power of him that is intitled to adminiftration to defeat the plaintiff of his execution. For fuppofe he never takes adminiftration, muft the execution ftand ftill? If the landlord himfelf had not demanded before removal, he had been too late. Here was no landlord at all, fo that there could be no demand, and it is now too late to afk it.

On 8 Annae, the landlord muft demand or the fheriff is not bound to fecure the rent. Fortefc. Rep. 360.

As to what acts adminiftration fhall relate to the death of the inteftate. Gilb. Eq. Rep. 223. 11 Vin. Abr. 133. pl. 29. n.

Between the Parifhes of Murfley *and* Grandborough, in Com' Bucks.

BY an order of two juftices *John Chappell** was removed from *Murfley* to *Grandborough*. Upon appeal to the quarter-feffions they ftate the cafe fpecially for the opinion of the court.

A man cannot be removed from his term. Seff. Caf. 133. Sir

* *James Burrow* obferves, that this cafe is not fo full either in feffions cafes, or *Strange*, as his *own*, or indeed at all coming up to the prefent point in queftion, which his *does*, and *agrees exactly* with the reprefentation of the court given in *Bur.* Settl. Caf. 307. pl. 110. See Id. 310. n.

That *John Chappell* before his marriage with *Susanna* his wife was settled in the parish of *Grandborough*. That Sir *John Fetherstone*, by indenture dated 24 *September* 1667, did demise and grant to *Robert Eddin*, his executors, &c. one cottage with the appurtenances of the yearly value of 30 *s.* in *Mursley* for ninety-nine years at 1 *s.* rent. That 3d *August* 1689 *Eddin* assigned to *Goddin* in trust for *Mary* his wife for life, and then to *William Eddin* his son for the residue of the term. That *Robert*, *Mary* and *William* died, and *Susanna* the wife of *William*, as administratrix, became intitled to the term, and *May* 11, 1709, in consideration of 15 *s.* demised to *Nicholas Eymes* the same cottage (except one bay of building being the south part thereof with a leastowe for an habitation for herself) for twenty-four years at a pepper-corn rent. That she lived in that part of the premisses so reserved, and married the said *John Chappell*; and whether he is settled thereby in *Mursley*, was the question; and the sessions adjudge it no settlement, and confirmed the order of the two justices for his removal to *Grandborough*.

Denton now moved to quash both the orders, *John Chappell* being legally settled in *Mursley*. For where a man has an estate in any parish, he gains a settlement if he lives there. It has been often adjudged as to a freehold. *Mich.* 10 *W.* 3. *Ryslip et Harrow*, *Salk.* 524. And *Pasch.* 11 *Annae*, *Harrow et Edgware*, it was resolved in the case of a copyhold of a man's own for life, though but 25 *s.* yearly value.

Darnall Serjeant. He must be settled in that parish where the estate of his wife lay and on which he inhabited. For he coming by marriage to that estate, does not come to inhabit under the circumstances mentioned in the act, *liable to become chargeable*, and so not subject to be removed. In that case of *Ryslip* and *Harrow*, *Holt* C. J. said, the terms *not removeable* and *settled*, are one and the same thing; because such a person is not within the authority of the justices. He that comes to an estate by descent, purchase, or marriage, is not a person that takes a tenement within the intent of the act.

Reeve contra. The wife has but the trust of a small part of a cottage, for the legal interest of the estate is in *Goddin*. This is but an estate for years, and that has never yet been adjudged sufficient to give a settlement. A freehold has, and so has a copyhold, for that is by custom become a durable estate. And the same argument may be used, if this holds, where he takes a lease for years not of 10 *l.* value at a rack rent.

Lee

Lee. The wife takes the term as adminiſtratrix, ſo he is only intitled in *auter droit*, and as it is under 10 *l.* *per annum* yearly value, he is likely to become chargeable, and ſo may be removed.

Curia. This is not a caſe within the intent of the act, which was to prevent perſons running up and down from one pariſh to another, till they become vagabonds. But a man who comes to ſettle upon his own, is not to be conſidered in that view; and be it for life or years, the law is the ſame. This is not a taking a tenement under 10 *l.* *per annum*, for the 1 *s.* is not reſerved as a rent, but only an acknowledgment uſually paid on long leaſes. The caſe of a copyhold is ſtronger than this, for that is but an eſtate at will. The way to make him chargeable, is to ſtrip him of his own, for he may not be able to let it. The orders were quaſhed.

Dominus Rex *verſus* Inhabitantes de Hales Owen.

THE ſeſſions, reciting that *Joſeph Higgen* was bound out by indenture as the ſtatute requires, to *John Parks*, and being lame, and having the king's evil, and in the opinion of ſurgeons incurable: therefore the ſeſſions diſcharge the maſter from his apprentice, and four juſtices ſign the order. Seſſions cannot diſcharge apprentice on account of ſickneſs. 3 Vin. Abr. 27. pl. 16. S. C. S. P.

Darnall Serjeant moved to confirm the order, becauſe the maſter cannot now have the end of the binding, which was the ſervice of his apprentice.

Willes contra. The ſtatute only empowers the juſtices to diſcharge for miſbehaviour, and not for ſickneſs. Beſides, allowing they had a power to diſcharge, yet here they have not executed it as the ſtatute requires; for it is not inrolled; neither is it mentioned to be by a juſtice of the (1) *quorum*. There muſt be four juſtices, one of the *quorum*. (1) But ſee new ſtat. 26 Geo. 2. c. 27.

Both exceptions to the form were held good. But the court quaſhed the order as to the ſubſtance, for the maſter takes him for better and worſe, and is to provide for him in ſickneſs and in health.

Hinchcliffe *verſus* Payne.

PAYNE the father, being in contempt in Chancery for nonpayment of money, an order is made upon him. *Payne* the ſon reſiſts the ſervice, for which contempt he is committed to Eſcape warrant where grantable.

the *Fleet*, and turns himſelf over to the *King's Bench*, and goe at large till he is taken up by an eſcape warrant, and committe to *Newgate*. Now he moved for a *Superſedeas* to that eſcap warrant, the contempt not being ſuch an one as is within 1 *Anna c.* 6. which ſpeaks only of contempts *for not performing an orde* which *Payne* the ſon was not obliged to do. *Et per curiam* The father would have been within the act, but the ſon is no This ſtatute is not to be extended by equity, becauſe it is again the liberty of the ſubject, and this is a new power given only i particular caſes; this is not one of them, and therefore n within the ſtatute. Whereupon the warrant was ſuperſede and the marſhal directed to go to *Newgate* and take him in his cuſtody again, as was done in Sir *Thomas Tippin*'s caſe.

Aires *verſus* Hardreſs.

If execution be taken out within the year, it may be continued down, and a new execution *ſans ſcire facias.*

A *Fieri facias* was taken out within the year, and a *nulla bon* returned; this is continued down for ſeveral years, an then a *capias ad ſatisfaciendum* iſſued. And whether that be re gular or no was the queſtion. The court took time to inqui and the laſt day of the term the C. J. ſaid, If this were a ne caſe they ſhould think it hard to take away all *ſcire facias's*. Bu the practice had gone ſo far, that there is no overturning now. 1 *Inſt.* 290. 4 *Inſt.* 271. *Mod. Caſ.* 288. 1 *Sid.* 5 1 *Keb.* 159. *Cliſt* 840. *Officina Brevium* 96. *Raſtal.* 16 Wherefore the execution was held regular.

Dominus Rex *verſus* Skingle.

Tithes are a *tenement.*

THE 43 *Eliz. c.* 2. charges lands, tenements, tithes, &c. t the poor's rate. By a private ſtatute for erecting work houſes in *Colcheſter* the poor are provided for in another manne and the occupiers of lands and tenements are made chargeabl And after a rate an appeal is given to the ſeſſions. The defend ant was parſon and rated for his tithes, and appeals; and be cauſe the word *tithes* was not in the act of parliament, whic the ſeſſions looked upon as an abſolute repeal of the 43 *Eli quoad Colcheſter*, therefore they diſcharge him. *Et per Curiam* He ought not to be exempted but by expreſs words, being liab before. Here he is an occupier of a tenement, for tithes are tenement. 1 *Vent.* 173. 2 *Lev.* 139. *Lutw.* 1563. 1 *Inſt.* (*Dy.* 83. *Litt.* §. 647. 32 *H.* 8. *c.* 7. *Co. Litt.* 159. *Cr Jac.* 301. 2 *Inſt.* 625. Wherefore the order of ſeſſions wa quaſhed. *Powell* v. *Bull*, *C. B.* this queſtion determined in th ſame manner.

Com. Rep. 265.

Domin

Dominus Rex *versus* Arnold.

At Nisi prius *in* Middlesex, coram Pratt, *C. J.*

INdictment against defendants, for that they being churchwardens and two others overseers *debito modo appunctuat'*, did refuse to join with the overseers in making a poor's rate. And the C. J. held the prosecutor to shew an appointment of the overseers under the hands and seals of two justices, as the statute requires. And he rejected parol evidence, because he said it must be produced, that he might judge whether it was a sufficient appointment. He quoted *Willoughby* v. *Dixey*, *in C. B.* where a will entered in the spiritual court books to be delivered out to the executor, was refused to be read, till application and refusal of the executor was proved. And the same in Sir *Edward Seymour's* case as to a deed. Defendant acquitted.

No parol evidence of an appointment of overseers. Sess. Cas. 141.

Baker *versus* Lord Fairfax. Ibidem.

ON an issue out of Chancery one of the witnesses, after his depositions taken, became interested, and confessing it now upon a *voire dire* he was rejected. Then it was desired to read his depositions as if he was dead; and a case was urged, where in Chancery a witness was made executor and revived the suit, and was read at the hearing. But the Chief Justice remembered the case in *Salk.* 286. which was the resolution of two courts on a trial at bar; and so he refused to hear the depositions.

Depositions taken before, no evidence after witness becomes interested.

Dominus Rex *versus* Bennett.

UPON the trial of an information in the nature of a *quo warranto* for exercising the office of mayor of *Shaftesbury*, the jury found a verdict for the defendant; and upon a motion for a new trial great doubts arose, whether after a verdict for the defendant there could be any new trial, though the judge should certify (as he did in this case) that it was a verdict against evidence.

Court divided about a new trial in an information in nature of a *quo warranto*. cited in Andrews 168. 21 Vin. Abr. 480. pl. 17. 8 Mod. 207.

After the point had been twice spoken to *in B. R.* it was adjourned *propter difficultatem* to be argued before all the Judges of *England*, who being this term assembled at *Serjeants-inn* the following arguments were made.

Denton. New trials can only be granted by the superior courts, and not by any inferior ones. Trials at the assizes are subordinate trials, and under the inspection of the superior court out of which the record issues. In *Stiles* 466. which was the first new trial that ever was granted, it was said by *Glynne*, that the court in these cases has a judicial but not an arbitrary discretion, I must agree that generally no new trial shall be granted after a trial at bar, but yet in the *scire facias* against *Bewdley*, *Trin.* 11 *Annae*, which was brought to the bar, and the jury refused to find a special verdict, the court ordered a new trial.

1 Will. Rep. 107.

It is objected, that this is a criminal proceeding. But we say, that since 9 *Annae*, *c.* 20. it has a mixture of civil. The relator is liable to costs, and the statutes of jeofailes extend to it. And why should not this be considered in the same view as *Mandamus*'s, upon which new trials are granted frequently. The original writ of *quo warranto* was merely civil. *Old N. B.* 107. *Sid.* 54, 86. 2 *Inst.* 282. *Rastal* 540. *Old Ent.* 133, 134. and upon that the franchise, which was a civil right, might be seized. Formerly indeed upon an information in the nature of a *quo warrrnto* the party could only be punished for the usurpation. *Yel.* 190. *Cro. Jac.* 260. 1 *Bulst.* 54. *Co. Ent.* from 527 to 564. but now judgment of *ouster* may be pronounced.

These rights are of a high nature, and it would be a great inconvenience to tie them up stricter than actions. Suppose the jury should refuse to find a special verdict, or the Judge should mistake the law; will there not be a failure of justice, if a new trial cannot be had? *Mich.* 2 *Geo.* *Rex* v. *Inhabitantes de Walthamstow*, in an indictment for not repairing the highway, and *Regina* v. *Inhabitantes de com' Wilts*, for suffering *Lacock-bridge* to be in decay, new trials were granted.

Pengelly serjeant. This is a discretionary question, wherein no defect of power is to be supposed. The defendant cannot plead Not guilty. 2 *Inst.* 282. 2 *Co.* 24. *b.* 28. *b.* *Hardr.* 423. *Cro. Jac.* 43. but must disclaim, or shew his right. It is the prerogative of the crown to determine civil rights by way of information. Thus the King brings his information of intrusion in the Exchequer, which is but a common ejectment. And so informations by way of *devenerunt*, which is in effect an action of trover; and in these cases new trials are every day granted. *Co. Ent.* 390. And in those cases there is a fine.

It

It will be no objection that the year is expired; for this profecution was commenced within the year, and the judgment must be the fame, becaufe it is to avoid all mefne acts. *Co. Ent.* 527, 530. *Trin.* 8 *Ann. Regina* v. *Barber.* That was an information of this nature againft the defendant, who claimed to be burgefs of *Thetford.* There was judgment by default, and then came a pardon, which was held only to difcharge the fine, but not the judgment of *oufter.* The fine here will be *falvo contenemento*, according to *magna charta*, and the bill of rights. Since the ftatute this has all the incidents of a civil profecution, the commencement only excepted. Before the King only could have it, but now any private perfon may at peril of cofts. If no new trial be granted, the crown will be in a worfe condition than the fubject: For here the verdict will be final, and no new information can be had.

Earl Serjeant *contra.* The only queftion is, whether this be a criminal or a civil profecution. For on the one hand, if it be of a civil nature, I muft agree a new trial may be granted: And on the other hand, it muft be admitted, that if this be merely criminal, no new trial can be had.

It is not denied, but that at common law this information was a criminal proceeding; whether the ftatute has altered the nature of it is the doubt. We think it remains as it did before. The confequence of it is ftill fine and imprifonment, with this addition, that judgment of *oufter* may be given, which could not before; and becaufe the ftatute has made it more penal than it was at common law, therefore fay they it is now changed from a criminal to a civil nature. This is fuch an inference, as I cannot fee into the reafon of. But fay they, the ftatutes of jeofails do not extend to criminal proceedings, but they extend to this; *ergo* this is not a criminal proceeding. I defire to know whether it will be pretended, that they would have extended to this cafe without the exprefs provifion of the ftatute. Certainly they would not. And the Parliament was aware of that, and therefore added that claufe. The firft new trial is *Stiles* 448. and there the witnefs died of an apoplexy. *Lord Townfend* v. *Dr. Hughes in C. B.* 2 *Mod.* 150. In *fcandalum magnatum* a new trial was denied. Cannot the King releafe, pardon, or ftop this profecution? Surely he may. In capital cafes the defendant may plead *autre foits acquit*; fo careful is our law, that the fubject fhall never be bore down by the weight of the crown. 1 *Sid.* 405. 2 *Keb.* 403, 765. 1 *Lev.* 9. 1 *Keb.* 124. are cafes where the defendant was convicted, and *in favorem libertatis* a new trial may be granted. *Mich.* 3 *W. & M. Rex* v. *Davis*, in an information for a riot a new trial was denied. *Mich.* 7 *W.* 3. *Smith* v. *Frampton*, *Salk.* 644. in 1 Show. 336.

in an action for negligently keeping his fire, wherein the defendant was acquitted, it was refused to be tried again. Indeed *Pas.* 4 *Jac.* 2. *Rex* v. *Simpson et al'*, information for seditious words, after acquittal a new trial was granted, but whoever observes the time that case happened, and that it was denied for law by *Holt* in *Davis*'s case before cited, will think it of little weight. *Pas.* 2 *W.* & *M.* Dr. *Salmon*'s case, the defendant was convicted of perjury, and had a new trial; but the court said it would have been otherwise if he had been acquitted. *Pas.* 5 *Ann.* *Regina* v. *Clarke*, in an indictment for a nusance, after acquittal the court denied a new trial, till the defendant came in and consented. It was granted in Sir *Jacob Banks*'s case, only because he had carried it down by proviso, which could not be against the crown. *Mich.* 3 *Ann.* *Hartness* v. *Sir J. Barrington*, after the defendant had been acquitted of an assault, a new trial was denied. So *Salk.* 646. after acquittal for a libel.

Salk. 652.

In this case the office is determined, so there can only be a fine and imprisonment. And if one new trial may be had, the same reason will hold for a second and a third, and no body can say where it will stop. It may happen that the defendant may be convicted on a second trial, for want of that evidence which acquitted him before. The case of *Bewdley* was only a *scire facias*, which is a proceeding purely civil.

Yorke. This question is of far greater consequence to the subject than the crown. It consists of two parts:

1. Whether a new trial can be granted in any of those cases.

2. Whether there be any particular circumstances in this case, to distinguish it from the general ones, and so induce the court to refuse it.

First, When new trials first came in, they introduced a great alteration. The case of *Fenwick* v. *Holt* (which was an information, and not an indictment as some of the books say) is full in point; and the court said they could not do it without altering the law, which shews there is not a discretionary power. This is the rule in criminal cases, which I shall shew this to be. At common law usurpations were a crime, a contempt to the King, and an oppression of the subject. A *quo warranto agit in rem*, an information in nature of a *quo warranto in personam*. The first charges a crime, and the other a *user* of the franchise. This is all of the crown side, which the civil rights of the crown are not, as *quare impedits*, which are of the plea side. The replication concludes, *petit quod convincatur*;

vincatur; and fo is *Co. Ent. tit. quo warranto*; now *conviction* implies *crime*. This cannot be called an action, the profecutor neither demands nor recovers any thing, *et actio nil aliud est quam jus profequendi in judicio quod fibi debetur*.

When proceedings in eyre dropt, then informations came in, which are of a higher nature than the proceedings in eyre. 2 *Inft.* 282, 498.

The ftatute 9 *Ann.* takes notice of this as a criminal proceeding: As for the cofts, they are collateral, and cannot change the nature of it. The 4 & 5 *W. & M. c.* 18. gives cofts in perjury, where prefented as a mifdemeanor by information; and can any one fay it is now become a civil profecution? In the cafe of *Strode* v. *Palmer* it was held, that *mandamus's* would not come within the defcription of *actions*, fo as error might lie in the Exchequer Chamber. Lill. Ent. 248. cited in Andrews 288. poft. 537, 541.

The jury may take the law upon them if they will. *Litt.* §. 368. The relator here is only appointed for the fecurity of the cofts. In the cafe of *Ilchefter* he died, and thereupon the defendant moved to ftay the proceedings: No, fays the court, this is the caufe of the crown. I omit his argument from the facts in this cafe.

Denton replied, The claufe of jeofails was only thrown in, *in majorem cautelam*, as declaratory of the law.

Pengelly. Sir *T. Jones* 163. new trial after conviction of perjury.

Afterwards *in B. R. Pratt* C. J. declared, that they had called in the affiftance of the other Judges, and that upon the whole they were equally divided; fo no rule for a new trial could be made. The divifion, as I was informed, was thus: For a new trial, *in B. R. Pratt* and *Eyre*; *in C. B. King* and *Tracy*; *in Scacc. Price* and *Montagu*. Againft a new trial, *in B. R. Powys* and *Fortefcue*; *in C. B. Blencowe* and *Dormer*; *in Scacc. Bury* and *Page*.

Long

Long *versus* Buckeridge.

Intr. de Trin. 1 Geo. rot. 555.

Attornment, where necessary.

REPLEVIN for taking the plaintiff's goods and chattels in the parish of *St. Botolph Aldgate* in his shop there. The defendant avows the taking by distress for a fee-farm rent, and says, that King *James* the First by letters patent dated 24 *May*, 7th of his reign, *dedit et concessit* the premisses (*inter alia*) to the grantees therein named, *habendum* to them and their heirs for ever, *tenendum* of him and his successors, as of his manor of *East Greenwich* by fealty only, in free and common socage, and not *in capite* or by knights service, *reddendum* to the King and his successors the yearly rent of 22 *l.* in lieu of all rents, services and demands issuing out of the premisses. That King *James* being so seised of this rent in right of his crown, by letters patent, 19 *January*, 9th of his reign, gave the said rent and services to *Lawrence Whitaker* and *Henry Price*, and their heirs. That *Henry Price* died, and *Whitaker* survived and was sole seised, and made his will, from whence and from a great many *mesne* conveyances (as a fine to the use of the conusee, and a devise by him) the avowant brings down a title to himself; and then goes on and says, that he was seised in fee of this rent, and avows the taking for arrears, and prays judgment and a return. To this the plaintiff has demurred, and the avowant has joined in demurrer.

This cause was formerly spoke to at large, and the opinion of the court with the avowant. Only they reserved one point to be farther spoke to, whether the avowry is ill for want of alleging an attornment of the terretenant upon the fine levied of the rent in question by *James Bewly* and his wife to *William Buckeridge*, under a devise from whom the avowant claims.

Yorke pro querente argued, that the avowry is ill, which depends on two considerations:

1. Whether *William Buckeridge* the conusee, who is alleged to be seised by vertue of this fine, was in at common law, or by the statute of uses. For on the one hand it is plain, that if he was in at common law, though the rent passed by the fine, yet it did not enable him to distrain without attornment; and on the other hand it is as plain, that if he was in by the statute of uses, then no attornment was necessary.

2. Supposing

2. Suppofing he was in at common law, whether here is any other matter appearing upon this avowry fubfequent to the fine, which has cured this defect, and taken away the neceffity of attornment as to the avowant.

As to the firft it is to be obferved, that this is a fine levied to the conufee and his heirs, and it enures by way of grant of this rent, and after it is fet out, there comes an averment that it was to fuch ufe.

If the matter had refted upon the words of the concord itfelf, there would have been no doubt but he would have taken at common law; for it is a common law conveyance of the rent to him, and he muft have been taken to have both the legal eftate, and the ufe, which is the profitable intereft, unlefs fomething further had appeare to control that intendment, and give it a contrary conftruction. So it was held in the cafe of *Lord Anglefey* v. *Aitham*, *Paf.* 8 *W.* 3. *B. R. Salk.* 676. There a fine was levied, and afterwards a common recovery fuffered, wherein the conufee of the fine was tenant; and there being no deed to lead the ufes, it was objected, that the ufe of the fine refulted to the conufor. But the court held, that it fhould be intended to the ufe of the conufee, and in pleading need not be averred; and fo is *Co. Ent.* 114, 273. *Plow.* 477. But if it were to the ufe of the feoffor or conufor, then it muft be averred. Latch. 257, 21 Palm. 483.

Shortridge v. *Lamplugh*, *Mich.* 1 *Ann. B. R.* the queftion was upon pleading a conveyance by leafe and releafe, where no confideration was fhewn, nor exprefs ufe averred, whether it fhould be taken to go by way of refulting ufe to the releffor; but the court held, it fhould not, unlefs it were exprefsly fhewn, but that the eftate and ufe vefted in the releffee. 2 Mod. Ca. 7 Salk. 678. Far. 71.

If this be the proper conftruction upon the face of the fine, then the fubfequent averment, that it was to the ufe of the conufee and his heirs, will not alter the cafe, nor make him to be feifed by force of the ftatute of ufes. For there is no room for the operation of that ftatute, nor can it have any effect which the common law could not fully have without it.

Before the ftatute of ufes, interefts in lands fell under the confideration of the *legal Eftate*, which was the poffeffion; and *the ufe*, which was barely a truft, an equitable right to receive the profits. Thefe might fubfift in different perfons, and he who had the ufe had no remedy but in Chancery. But on a gift to

J. S.

J. S. and his heirs, he would have had both the poſſeſſion and the uſe; for he could not be ſaid to be a truſtee for himſelf, but the uſe would have merged in the poſſeſſion.

Thus it ſtood at common law when the 27 *H.* 8. *c.* 10. was made; and that only operated, where the poſſeſſion and uſe were divided, and drew the poſſeſſion to the uſe, and not the uſe to the poſſeſſion. But as to perſons who had both the poſſeſſion and the uſe, as they needed not the help of the ſtatute, ſo it left them where it found them.

N. B. Where the fine is to *A.* and his heirs to the uſe of *A.* and *B.* in fee. They are both in by the ſtatute of uſes. Hutt. 112.

The reſult of this is, that no perſon can be ſaid to be in by the ſtatute of uſes, but he who before would have only had the truſt; but in this caſe the conuſee would have had both the legal eſtate and the uſe, and therefore he cannot be ſeiſed by the ſtatute of uſes. And this diſtinction is warranted by the authorities. 2 *Roll. Abr.* 780. *pl.* 3. 2 *And.* 15. *Salk.* 90. And in *Co. Litt.* 309. *b.* it is ſaid that if a fine be levied of a ſeignory to another to the uſe of a third perſon and his heirs, he and his heirs ſhall diſtrain without attornment, becauſe he is in the ſtatute of uſes. By which it appears, that it being to the uſe of a third perſon, that makes him in by the ſtatute of uſes.

2. Suppoſing the conuſee in at common law, and that he would have wanted an attornment to enable him to diſtrain; whether any other matter appears, to have cured the want of it as to the avowant.

It has been inſiſted, that the conuſee deviſed it by his will under which the avowant claims, and that attornment is not neceſſary on a deviſe.

Attornment, what.

This will be anſwered by conſidering the nature and reaſon of attornment. An attornment is the agreement of the tenant to the lord's conveyance of the ſeignory to another hand. *Co. Lit.* 309. *a.* The reaſon is, that by the common law there ought to be a privity, that the tenant may know who to pay his rent to, and whoſe is a lawful or a tortious diſtreſs. *Vaugh.* 39. And this privity is originally created by the tenant's accepting the tenancy.

But then the lord could not by his own act alone ſubject the tenant to the diſtreſs of another; and therefore if he granted away the ſeignory, the privity was deſtroyed, till the tenant had attorned by his voluntary agreement, or was forced to it by a *quid juris clamat*, or a *per quae ſervitia*, againſt which he might have his proper defence. And this privity was neceſſary to be continued on through every conveyance. *Yelv.* 135.

2 And

And attornment was of such necessity, that by a grant *in pais* nothing passed without it, though by a fine indeed such things as lay *in prendre* passed, but not such as subsisted *in jure tantum*, as a privity to distrain. *Co. Litt.* 320. *a.*

This was the case of him who came in by the act of the party only, but not where he came in by act of law, as the heir by descent, tenants in dower, courtesy, statute-merchant, or *elegit*; devisee, or lord by escheat. The ground for all this is, that they had no means to compel attornment, and 6 *Co.* 68. *a.* my lord *Coke* gives this rule, *Quod remedio destituitur, ipsa valet, si culpa absit.* So that he who would distrain without attornment, must stand clear of all laches, which this conusee does not, for he has slipt his time of bringing a *quid juris clamat* or a *per quae servitia*, which must be before the ingrossment of the fine. *Bro. Quid juris clamat*, 355. *F. N. B.* on the writ of covenant to levy a fine. *Plowd.* 431. *b.* *Pop.* 63.

And as the conusee shall not distrain, so his devisee shall not, for *nemo potest plus juris ad alium transferre quam in ipso est.* The bargainee of this conusee could not distrain, though he would come in by the statute of uses. *Co. Litt.* 309. *b.* 5 *Co.* 113. *a.* The reason of which is, that though the statute supplies such a defect in the bargainee's title, yet it meddles not with the bargainor's. And besides, there is an interruption of the privity, which ought to have been handed down through all the grants. *Cro. Eliz.* 832, 354. *Ow.* 23.

A devisee cannot be in a better condition than a bargainee by deed inrolled. I agree an attornment is not necessary to a devise; and the reason given upon *Litt.* §. 586. is, that the tenant shall not have it in his power to frustrate the will. But here, requiring an attornment doth not give the tenant that power, it only puts it in the power of the devisor to defeat his own devise by his own laches.

In *Cro. Eliz.* 354. the case of a lord by escheat and a devisee are coupled together, but surely they stand upon different reasons. In the case of an escheat the privity continues, for the tenant comes in *mediately* subject to the superior lord, whose title is paramount to the tenant's, which a devisee's is not, for he comes in under the title of the devisor, and is not a person to whom the tenant made himself subject either mediately or immediately.

It

It was objected, that this was but matter of form, and ſhould have been ſhewn for cauſe of demurrer. But I anſwer, that this is a neceſſary circumſtance to give a power to diſtrain, and is here the very merits of the cauſe.

It was ſaid, a verdict would have cured this defect, but I deny that, for by the fine the thing granted paſſes without attornment, and the jury may find *conceſſit* without it. Tho' in a grant by deed I agree a verdict would have helped it; becauſe there nothing paſſes till attornment. *Raym.* 487.

Squib contra. I agree the conuſee is in at common law, and that where the uſe paſſes to the ſame perſon, the ſtatute has no relation. Seignories were at firſt inſtituted on a military account; and therefore attornment was brought in, that the tenant might not be obliged to ſerve under a ſtranger in the wars.

Though the conuſee could not diſtrain without attornment, becauſe he could compel it by a *quid juris clamat, per quae ſervitia*, or *quem redditum reddit*, yet we are in the caſe of a deviſee, who has no means to compel attornment, and that is the reaſon why a deviſee may diſtrain without it. *Litt.* §. 586. 1 *Inſt.* 322. One that claims under letters patent may, and ſo may any body to whom no laches can be imputed. 6 *Co.* 68. 5 *Co.* 113. 39 *H.* 6. 24. *Bro. Attorn.* 29. 5 *H.* 7. 19. Lands deviſed from the heir veſt before agreement, *et intereſt reipublicae ſuprema hominum teſtamenta rata haberi.*

But admitting attornment ought to have been ſet out; then I inſiſt, that it appears ſufficiently upon this record, and that an attornment is implicitly averred. For if attornment be neceſſary, then he could not be ſeiſed by force of the fine, and it is ſaid *quod virtute inde* the conuſee *ſeiſitus fuit* of the rent; neither can that part of the avowry be true, which ſays, that the plaintiff became *onerat'* with the payment of the rent to the avowant, which he could not be, unleſs the avowant had a title to diſtrain, and he could have no title without attornment.

But even admitting that attornment was neceſſary, and that none appears upon this record; yet the want of it ſhould be ſhewn for cauſe of demurrer, for it is but a circumſtance and matter of form, ſince the act for the amendment of the law; and there appears ſufficient for the Judges to give judgment according to the very right of the cauſe.

Yorke

Yorke replied. The tenant might defend himſelf in a *per quae ſervitia*; and to give the deviſee a power to diſtrain, where the deviſor had not, is to ouſt the tenant of his defence. Suppoſe the conuſee had deviſed it immediately and died, would not there have been a new lord put upon the tenant without his privity or conſent? I agree, in an action of debt for this rent, the attornment would have been but a circumſtance; for the rent paſſed by the fine, but not a power to diſtrain for it. And as to what is ſaid about *ſeiſitus* and *murat'*, I admit it to be true, that he was ſeiſed of the rent by force of the fine only, but had no power to diſtrain. *Adjournatur*; and in a few days

Pratt C. J. delivered the reſolution of the court. This caſe is now reduced to a ſingle point, whether it was neceſſary for the avowant to ſet out an attornment upon the fine to *William Buckeridge*, under a deviſe from whom he claims. We are all of opinion, that for this fault the avowry is ill. It ſeemed to be given up at the bar, and therefore I ſhall but lightly touch upon it, that the conuſee was in at common law. The fine is a common law conveyance, by which both the legal eſtate and the uſe would have paſſed to the conuſee, without any declaration of uſes, according to the caſe of lord *Angleſea* v. *Altham*; and therefore the uſes need not have been averred, it is but *expreſſio eorum quae tacite inſunt*; whereas if it had been to the uſe of a third perſon, they muſt have been averred, in order to controul the general operation which the fine would otherwiſe have had. This conuſee did not want the help of the ſtatute, and therefore it meddles not with him, but leaves him in at common law. 2 *Roll. Abr.* 780. *pl.* 3. 2 *And.* 15. *Salk.* 90. *Co. Lit.* 309. *b.*

Since he is in at common law, it is not diſputed, but that attornment was neceſſary to enable him to diſtrain; but the avowant ſays, he is in the caſe of a deviſee, and on a deviſe no attornment is neceſſary. This is true, that generally a deviſee ſhall diſtrain without attornment, but then his deviſor muſt have been enabled. If he had not that power, he could not transfer it, according to the rule in Sir *Moyle Finch*'s caſe, *Nemo poteſt plus juris ad alium transferre quam in ipſo eſt*. This rule holds in all ſciences, in logick *Nil dat quod in ſe non habet*; a bargainee has no more privileges than his bargainor, and of the two, he is to be favoured before the deviſee. 5 *Co.* 113.

The caſe of a deviſee and lord by eſcheat are unſkilfully coupled together in *Cro. Eliz.* 354. as was mentioned at the bar; and though in the latter end of that caſe there falls an

an expression *obiter*, which seems to make for the avowant; yet that can have no weight; it is tenderly said, and is directly contrary to the principal case. There is no doubt but the lord by escheat may distrain without attornment, for he claims by title paramount, and the old privity revives. *Mallorie's* case, 5 *Co.*

And as we think it necessary, an attornment should be set out; so we are likewise of opinion, that none appears upon this record. The conusee was *seisitus*, and the tenant *onerat'* by the fine only; but that passed no power to distrain. If this had been by deed, an argument might have been drawn from those words, because there nothing would have passed before attornment. We think likewise, that this is matter of substance, and so the avowry is ill on a general demurrer.

Reeve prayed to discontinue, because the avowant is as an actor. *Sed per Curiam:* It is the plaintiff's suit, and how can one man discontinue another's suit. *Judicium pro quer'.*

Michaelmas Term

5 Georgii Regis. In B. R.

3 Bac. Abr. 535. Sel. Cas. 248. Andr. 183.

Sir John Pratt, *Knt. Lord Chief Justice.*

Sir Littleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Justices.*
Sir John Fortescue Aland, *Knt.*

Nicholas Lechmere, *Esquire, Attorney General.*

Sir William Thompson, *Knt. Solicitor General.*

Brooke *versus* Ewers & Ux'.

Mandamus in nature of a *procedendo ad judicium.*

YORKE moved for a *mandamus* to the Judge of the court of *Sandwich*, to give judgment upon a verdict, though he had granted a new trial for excessive damages without payment of costs. And for the *mandamus* he quoted 1 *Ven.* 187. *T. Raym.* 214. 2 *Keb.* 871. And he likewise insisted, that a Judge of an inferior court cannot grant a new trial, as was held by *Holt* C. J. *Mich.* 1 *Ann. Hall* v. *Hill. Mod.* 84. *Salk.* 201, 650. And likewise by *Parker* C. J. *Pas.* 12 *Ann. Page* v. *Round.* And to that opinion the court inclined, and granted a *mandamus* unless cause, and upon that the Judge below, as well advised, *quievit.*

A Judge of an inferior court cannot grant a new trial.

Between the Pariſhes of Beaſton in Nottinghamſhire *and* Sciſſon in Leiceſterſhire.

Order to remove *A.* and family bad as to family; but adjudication that it *was* the place of the laſt legal ſettlement is well enough. Salk. 473.

ORDER for removal of *Thomas Block* and his family from *Beaſton* to *Sciſſon*. And the juſtices adjudge, that *he* is likely to become chargeable, and that *Sciſſon was* the place of his laſt legal ſettlement. Upon the firſt reading it was quaſhed as to the family, *quia* too general: *Salk.* 482, 485. But the queſtion now debated was, whether there was a ſufficient adjudication of a ſettlement in *Sciſſon*; for it is not that it *is* the place of his laſt legal ſettlement, but that it *was* ſo, which might be twenty years ago, and he may have gained another ſettlement. And ſome ſtreſs was laid upon the variation of the expreſſion in the order *is* and *was*, as if the juſtices deſigned they ſhould have a different conſtruction. And the court now inclined this part of the order to be bad, till *Eyre* J. quoted a caſe between the pariſhes of *Lanbaddock* and *Languined*, *Mich.* 2 *Geo.* or *Hil.* 2 *Geo.* where it was, *are* likely to become chargeable, and that *Languined was* the place of ſettlement; and this exception taken and over-ruled. And upon this authority the order was confirmed as to *Block* himſelf, but the Chief Juſtice and *Forteſcue* J. ſaid, if it been *res integra*, they ſhould have doubted.

Stratton *verſus* Burgis.

Amendment. 3 Vin. Abr. 281. pl. 18.

AN attorney undertakes to appear for the defendant an infant. *Et per Curiam*, He is obliged to do it in a proper manner, and having entered it *per attornatum*, when it ſhould have been *per guardianum*, it may be amended.

Lewis *verſus* Farrel.

In caſe for malicious proſecution muſt ſhew proceedings determined, and how.

* 10 Mod. 145. 209. Gilb. Caſ. 163.

† 2 Vin. Abr. 35. pl. 23.

IN caſe for a malicious proſecution of an indictment, judgment was given for the defendant on demurrer, becauſe it was not ſhewn how the indictment was determined, according to the caſes of *Parker* * v. *Langley*, *Trin.* 12 *Ann. B. R.* and *Blagrave* † v. *Odell*, *Mich.* 3 *Geo. ro.* 228. [*Lucas* 200. *Salk.* 15. 6 *Mod.* 262. *Hob.* 267. *Yelv.* 117. 2 *Salk.* 456, 767. 5 *Mod.* 223, 224. *Saund.* 228. *Lev.* 275. 10 *Mod.* 219. *Gilb. Caſ.* 214. *R. Raym.* 503.]

Dominus Rex *versus* Guardianos ecclesiae de Thame in com' Oxon'.

MANDAMUS directed to the churchwardens of the parish of *Thame*, to restore *John Williams* to the office of sexton there.

On a *mandamus* to restore an officer who is in at pleasure only, it is a good return to say it was their pleasure to remove him, and in such case a summons is not necessary. 2 Str. 897.

They return, that the parish of *Thame* is an ancient parish, and that for time immemorial there has been a church, with churchwardens, and a sexton, eligible by the churchwardens and parishioners, or the major part of them, for that purpose at a day and place prefixed assembled; which person so elected was to continue in at the pleasure of the electors, and was always amoveable by the major part in form aforesaid assembled. That 1 *May* 1703. *John Williams* was elected sexton, and continued in the office till 32st of *July* 1717. upon which day the churchwardens and parishioners being duly assembled, *ad continuandum vel amovendum* the said *John Williams*, he at such assembly was by the churchwardens and major part of the parishioners removed from his said office, *et ea de causa* they cannot restore him.

Denton argued, that the return was insufficient. This is not a case within the *mandamus* act, so as we might traverse the return; and therefore it must be certain to every intent. It must answer all the suggestions of the writ, which this return does not: We lay that we were *debite elect' praefect' et admiss.* into this office: They answer to the *elect'* and *praefect'*, but not to the admission: For though that may be implicitly taken to be answered, yet returns by implication, and such as are argumentative only, are not good. *Raym.* 365, 153, 431. 1 *Sid.* 286. 2 *Jones* 177. The cases of 2 *Sid.* 49, 79. 1 *Ven.* 77, 82. *Raym.* 188. 1 *Sid.* 461. 2 *Keb.* 641. will be objected to me; but I give them this answer, That they were upon letters patent, where the appointment was only *durante beneplacito*; but we are here in the case of a custom, which is more unconfined; and 2 *Cro.* 540. a custom to remove a man *from his freehold* was held void. It does not appear the party was heard, or that the parish is supplied with another officer.

York contra. Wherever an officer appears to be in only at pleasure of the electors, it is sufficient to shew a determination of their will. 1 *Lev.* 291. 1 *Ven.* 77, 88. 2 *Keb.* 641. And those cases being of a grant, the argument is stronger in this case; for many things are good by custom, which are not so by grant. Where the power is to remove without cause, no cause of removal need be returned. And for this reason

also no summons or hearing of the party is requisite, for he is not removed for any crime. And whether the office is filled up or not is nothing to this man, nor can better his title a whit. The admission is not the point of the writ; but if it were, yet the *elect' et praefect'* is a full answer. He could not be *praefectus*, unless he was in possession of the office: So that when we shew him in possession, that necessarily implies a previous admission.

No *mandamus* lies for an officer at will. 2 *Lev.* 18. *Salk.* 428, 432. There appeared to be a power of removal at pleasure, but because the removal was for faults in his office, and not in pursuance of that power, a peremptory *mandamus* went: But it was held, that it had been good, if they had relied only upon their power.

The court held the return good. *Et per Pratt* C. J. The admission need not be answered, though it is fully done by *praefect':* Nor does there need any summons, for the reason mentioned. *Et per Powys* J. a charter cannot hinder a man from setting up a trade without apprenticeship, but a custom may. *Et per Fortescue* J. a sexton is called *ostiarius:* We ought not to grant a *mandamus*, without a certificate that the sexton was chosen for life. If he were removed for a crime, a summons is requisite according to natural justice; but the present case is a removal for what the party cannot gainsay.

Henderson *versus* Williamson.

Award must pursue the submission in point of form as well as in point of substance.

DEBT upon a bond, conditioned to perform the award of *J. S.* so as it be made in writing under his hand and seal by such a day ready to be delivered to the parties. The defendant after *oyer* pleads, *nul agard fait.* The plaintiff replies, that the arbitrator before the day made his award in writing, which is set out, and a breach assigned. And to this replication the defendant demurs generally. And *Comyns* Serjeant objected, that it did not appear to be under the hand and seal of the arbitrator, as the submission requires. *Bulstr.* 110. 1 *Roll. Abr.* 145. *Vaugh.* 109, 112. *Palm.* 121. 2 *Cro.* 277. And for this fault it was held ill: But the plaintiff had leave to discontinue.

Anonymous.

Variance.

CErtiorari to remove a conviction of forcible entry and detainer against *A.* and his wife: The conviction returned was against *A.* only: And for this variance the *certiorari* was quashed. *Vide Salk.* 146, 151.

Dominus

Dominus Rex *versus* Roe & al'.

An authority to two to do an act relating to the publick may be executed by one only.

YORKE moved to quash the return of a rescous, by which it appeared, that the warrant was to two, and the arrest only by one, without any words to sever the authority. *Sed per curiam*, Though that be an exception in the case of a private authority, yet it is none in this which relates to the publick justice; and this has always been the standing distinction, and therefore the return is good. *Vide* 1 *Inst.* 181. *b*.

King qui tam *versus* Bolton.

Where the first traverse is immaterial, there may be a traverse upon it. Lill. Ent. 523. cited in Andrew 12.

THE plaintiff declares in prohibition, setting forth that the city of *London* is an ancient city incorporated by the name of mayor, commonalty and citizens of the city of *London*, and that time out of mind there has been a common council consisting of the mayor, aldermen and certain citizens to the number of 250, elected within their respective wards yearly upon *St. Thomas's* day at the wardmote: That there have been usually twelve chosen for the *Tower* ward, and that the plaintiff on *St. Thomas's* day last, being a citizen and freeman inhabiting in that ward, was at a wardmote holden before the alderman duly elected and admitted a common council man for the year ensuing: But the defendants, in order to oppress him, 6 *February*, 4 *Geo.* deliver a petition to the court of common council, complaining of an undue election, and suggesting that they themselves were chosen; whereas the plaintiff avers, the common council had no jurisdiction to examine the validity of such election, but the same belongs to the court of the mayor and aldermen; and notwithstanding the plaintiff offered to prove the same, yet the defendants proceed against him, and concludes with averring the contempt. The defendants deny the contempt, *et quicquid, &c. et pro consultatione habenda* they admit the constitution, and manner of election; but then they say, That the mayor, aldermen and common council, time out of mind have had the cognizance and authority of hearing and determining the election of common council men: That on *St. Thomas's* day the defendants were duly chosen, but the plaintiff and one *Jeffes* pretending a right, intruded themselves into the said office, whereupon the defendants exhibited their petition to the common council, *prout eis bene licuit, absque hoc* that the jurisdiction is in the court of the mayor and aldermen. The plaintiff, *protestando* that the court of mayor and aldermen have a jurisdiction, for plea says, the common council have it not: And concludes to the country. To this replication the defendants demur, and shew for cause,

 that

that the replication is a departure, and that the plaintiff ought to have taken issue on the traverse, and not answered the matter of it barely by way of inducement. The plaintiff joins in demurrer.

Darnall Serjeant *pro defendent*. The plaintiff should have taken issue upon our traverse, and not meddled with the inducement to it. *Cro. Car.* 105. 2 *Mod.* 183 He shall maintain matter alleged by him, and denied by the other side, and not go over to matters *dehors* and collateral, arising only out of the inducement to the other's plea. *Vaugh.* 60. 2 *Mod.* 84. He shall not desert his own title, and recover upon a defect in the defendants. It is not enough for him to destroy my title, but he must go farther, and establish his own: If he does not he can never recover, for *melior est conditio possidentis*. *Hob.* 101. He that prays a prohibition, must prove his suggestion, as on *modus's* and citations out of the diocese. He that pleads in abatement, must give the plaintiff a better writ: Therefore when they say we have applied to an improper court, ought they not to shew us which is the proper one? and can that be determined, unless it be put in issue?

Whitaker Serjeant *contra*. This is a prohibition *pro defectu jurisdictionis*, and not barely *pro defectu triationis*. Here both plaintiff and defendant are actors, the one sues for damages by being drawn into into an improper court; and the other labours for a consultation, and for that purpose must intitle the court wherein he sues to jurisdiction. *Plow.* 469. *a.* *Dy.* 170, 171. 2 *H.* 4. 9, 10. For the only point is, whether or no the defendant has sued the plaintiff in a court that can and ought to determine the matter. The traverse is immaterial: We say the court of common council has no jurisdiction, and is it any answer to say the court of aldermen have none? We might safely have demurred, but we chose to waive that, in order to bring the right to trial. And though generally a traverse upon a traverse is not allowed, yet that rule does not hold in all cases. 1 *Inst.* 282. *b.* *Cro. El.* 99. *Mo.* 429. *Cro. El.* 407. 2 *Cro.* 372. *Pop.* 101. This is not like the case of a *quare impedit*, which has been mentioned, for there the plaintiff must make a title, in order to have a writ to the bishop.

Darnall replied. Suppose we had demurred to the declaration, and it had been held naught; should not we have had a consultation, without making out a title? They that take a cause from one court, must shew a jurisdiction in another: They say we have applied wrong, why? Because you should have gone to the court of aldermen, so that that's the point, whether the court of aldermen have the right.

C. J.

C. J. I did not expect to have heard an argument in so plain a case as this. The plaintiff says he is sued in the common council for a matter whereof the cognizance is only in the court of aldermen: consider now what is the ground of our sending a prohibition; it is not because the court of aldermen have a right, but because the common council has none, and therefore the traverse, which would avoid trying the right of the common council, and bring that of the court of aldermen in question, is immaterial. For suppose they had gone to issue upon that, and it had been found that the court of aldermen had no jurisdiction; yet that had not established the right of the common council, so as to intitle the defendants to a consultation. Whether they shall have one or not, depends upon the right which the common council has to determine this matter; and if they have none, I am sure we ought not to remit this cause to them, though the court of aldermen should fail of establishing their right. Though the plaintiff might have demurred, yet he was at liberty to go on to try the right. The cases where a plaintiff must recover upon his own strength, do not at all govern this; for if the common council have usurped a jurisdiction, which they have not; the plaintiff might have had a prohibition, without setting out where the right was. In the case of a *modus* it is otherwise indeed, because there the court below has originally a jurisdiction, which the other comes to overthrow by matter *ex post facto*. For these reasons I am of opinion, the prohibition ought to stand. To all which *Powys* J. agreed. *Et per Eyre* J. The plaintiff in overthrowing the jurisdiction of the common council has no need to set up another in opposition to it. Where the first traverse is immaterial, that is, where it will not put the proper point in issue, there may be a traverse upon that traverse.

Fortescue J. The defendant is properly the actor, because he must make title to the jurisdiction in which he sues; and whether that court has jurisdiction, is the only matter issuable; and not whether the plaintiff has alleged it properly elsewhere. The case of a *quare impedit* is intirely different from this case: there the plaintiff, as here the defendant, must recover upon his own strength, one his writ to the bishop, and the other a consultation. But the defendant there, and so the plaintiff here, needs make no title. If the right of the court of aldermen had been in issue, consider what would have followed. If their right had been established, it is no consequence that the common council have none, for there may be concurrent jurisdictions. If it had been found they had no right, does it follow that it is in the common council? That could not have intitled the defendants to a consultation. *Judicium pro quer'.*

N. B. This judgment was afterwards affirmed upon a writ of error in parliament.

Dominus Rex *versus* Grant, Majorem de Taunton in Com' Somerset'.

Quaere, Whether there remains any obligation at this day for officers of corporations to make the declaration against the solemn league and covenant.

UPON an affidavit, that the defendant at the time of taking the oath of office did not take the declaration required by the corporation act of the 13 *Car.* 2. against the solemn league and covenant, a rule was made, that he should shew cause why an information in the nature of a *quo warranto* should not go against him. And upon shewing cause:

Cheshyre Serjeant before he came to the principal matter made two previous points. 1. That no private person could apply for this information; and, 2. That in case he might, the affidavit was not sufficient.

9 Ann. chap. 20.

First, It will not be contended, but that in this case the court, upon the statute of 9 *Annae*, *c.* 20. has a discretionary power, either to grant or deny an information. The party is enabled to file it with leave of the court, that is upon application to it. He must pray to have it, and every prayer implies a power to deny. A *quo warranto* is the king's royal writ of right, which Mr. Attorney may exhibit whenever he pleases. *Yelv.* 192. 1 *Bulst.* 55. But no private person has such an unlimited power, not over informations in the nature of a *quo warranto.* The statute is calculated for the determination of private rights, where any dispute happens upon elections of members, and it was made chiefly with this view, as may be collected from the preamble and other parts of the act, which require a relator to be named, who shall be liable to costs, and extend all the statutes of jeofailes to these proceedings. He that prays the information, must lay some right to the office before the court, that it may appear the prosecution is not set on foot merely to gratify the humour and captious disposition of the prosecutor. My Lord Chief Justice *Holt* has censured actions which have been brought out of curiosity only to try the opinion of the court, saying he did not sit there to determine coffee-house disputes. The election of the defendant was unanimous, no competitor at all; so that there is no one but himself who claims a right to this office. It has been held criminal, to bring an action in another's name without his privity and consent. Here the prosecution is in the king's name, and yet he is not privy. His attorney does not appear to avow the prosecution.

Secondly, The affidavit may be true, and yet the defendant may have taken the declaration as the statutes requires, for he might take

take it before two juſtices at a different time from his taking the oath of office. Neither does it ſet out any tender of this declaration to the defendant, which is expreſly required by the purview §. 10. and though the proviſo ſeems to carry it farther, yet it will be abſurd to make the purview void by the proviſo. *Mich.* 8 *W.* 3. *B. R. Rex* v. *Major' de Oxon'.* 5 *Mod.* 360. That was a *mandamus* to reſtore *Job Slatford* to the office of town-clerk. They returned that he did not at the time of taking the oaths of office take the oath of allegiance. It was inſiſted, that a tender was neceſſary; but this was not the point upon which the caſe turned, but becauſe they only ſaid he did not take them at that time, without any negative words that he did not take it at any other time, which he well might. And for this reaſon a peremptory *mandamus* was granted. This caſe enforces my objection to the affidavit, and before I leave it I muſt obſerve, that though all the then great lawyers were concerned in it, yet not one of them ever thought of this declaration, which is now trumped up to ſacrifice the quiet of the whole kingdom to ſome private pique and revenge. Salk. 428.

As to the principal point (and a great point it is) I hope no information ſhall go, for three reaſons. 1. Becauſe this declaration has been diſuſed for theſe 30 years paſt. 2. From probable reaſons to induce an opinion, that this ſtatute is expired: and, 3. From the conſideration of the many inconveniencies which a contrary determination will bring along with it, and the evil influence it will have to inflame the nation.

Firſt, Sir *James Mackenzie* and Sir *David Dalrymple* in their treatiſes of the laws of *Scotland* tell us, that deſuetude of a law for 40 years amounts to a repeal of it. And ſince no proſecution has hitherto been ſet on foot upon this act of parliament, it is, according to *Litt.* §. 108. an argument, that none lies; and as this law has been ſo long eſteemed to be of no force, I may properly apply, what my lord *Coke* has more than once mentioned, *a communi obſervantia non eſt recedendum*; *et periculoſum exiſtimo, quod bonorum virorum non comprobatur exemplo.* 1 Vol. of Trials 291. Lord *Balmerino*'s caſe. Treatiſe of Laws 119.

Secondly, There are many reaſons to conclude this ſtatute is expired, and all put together are ſufficient, *nam quae non proſunt ſingula, junta juvant.* It is the reaſon and ſubject-matter which guides the conſtruction of acts of parliament, and from hence ſpring all thoſe inſtances which might be ſhewn, where general terms have been reſtrained to particular, and particular extended to general; where the words have reached all actions, and yet been confined to one ſpecies only; where ſtatutes mentioning the King have enured to the benefit of the ſubject; and on the contrary where acts of parliament penned with latitude

enough to include the subject, have notwithstanding been restrained to the King; where the plural number has stood for the singular, and the singular for the plural; nay even where the same words in the same law have had different constructions put upon them. 4 *Inst.* 330. 2 *Inst.* 25. *Hob.* 128, 299, 346. As suppose a man having an inheritance in one acre and but a freehold in another, conveys both to *J. S.* and his heirs for ever. Here *for ever* must be construed differently. 7 *Co.* 23. *Cro. Eliz.* 183.

The intention was but temporary, as appears by *Kennet*, *Vol.* 3. 138. Though never so many had taken the covenant, yet the extent of one life would wipe them all off. The candles were all lighted at once, and would burn out as soon as a single taper. It was confined only to persons then in being, who may reasonably be supposed to be all dead at this day: and as it was calculated chiefly for those who had taken the solemn league and covenant, it will be of no use now. The statute of uniformity 14 *Car.* 2. *c.* 4. which expresly determines it in 1682, induced a belief that it had the same continuance in all cases. And to shew this was not thought so considerable a thing as some people would make it, it is observable that it is left out in the militia act. I cannot pretend there ever was any
1 W. & M. c. 8. expresś repeal, but if 1 *W.* & *M.* *c.* 8. be not one as to this declaration, I question whether it be so of the oaths themselves. If the clergy were to take it but for a time, and the militia not at all, what reason is there to construe this obligation with a greater latitude to corporations? The danger is the same in each case, and so is the security to be against it.

Thirdly, There are many inconveniencies which will flow from an opinion that this law is still in force. I forbear to mention some of them, and shall only instance in those which are obvious to all the world. Many corporations will be utterly dissolved; the publick peace endangered, and the course of justice interrupted in all inferior jurisdictions. In some respects it may affect our legislature. How many will there have been, who have suffered under a sentence which the recorder of *London* had no authority to pronounce? The parliament is now sitting, and thither the proper application will be, as to the expertest physicians, who ought to have a hand in cutting off so many members, that there be no fever or consumption. It is not the first time this court has said, that matters which have come before them have been too big for them. In *Edward* the third's time the sheriffs took an oath against the *Lollards*, but when that came to be the established religion, it was dropped. 3 *Inst.* 188. 2 *Inst.* 479, 436, 790. *Cro. Car.* 25.

Denton.

Denton. The solemn league and covenant arose from a treaty between the parliament and the *Scots*, as appears by *Rushworth* and *Clarendon*, and all the histories of those times. This league was calculated for the extirpation of all episcopal government, by that means to overthrow the church; and can it then be imagined, that less care should be requisite to keep persons of that pernicious principle from intermeddling in church affairs, than from spreading the contagion in corporations?

But admitting the declaration was not temporary; yet though not expresly, it is implicitly repealed. The act requires the oaths and declaration to be taken together, and therefore the 1 *W.* & *M.* has not severed, but repealed them all. Some argument to evince this may be drawn from 2 *W.* & *M.* *c.* 8. for reversing the judgment in the *quo warranto* against the city of *London*, and from the 11 & 12 *W.* 3. *c.* 17. and especially from 1 *Geo.* *c.* 13. §. 23. in which the proviso will be of no force if such a latent defect as this can be trumped up. *Argumentum ab inconvenienti*, if it holds in any case, holds in this. In the case of *Bewdley* the *venire* was *de vicineto*, when it ought to have been *de corpore com'*, but because this had been the practice in all *scire facias's*, that practice prevailed against the express words of the act of parliament. In *Bernard's* case the court suspended their judgment, till they saw whether the parliament would think it proper to continue him and the others in prison.

2 W. & M. c. 8. 11 & 12 W. 3. c. 17. 1 G. 1. c. 13. f. 23.

The objection arises from the words *for ever hereafter*. To which I answer, that inasmuch as the design was but temporary, those words can only extend to a temporary obligation. On the statute of 5 *Eliz.* the precedents used to be, that the party did not use the trade at the time of making the statute; but on account of the length of time that is now disused. 5 El. c. 4.

Reeve. At the restoration three things were to be provided for; corporations, the militia, and the church. The militia are out of this question: the church *quoad hoc* seemed to be most concerned; and no reason can be given why there should be a more lasting provision for corporations, than for the church. The statute of *circumspecte agatis* extends to all bishops, though the bishop of *Norwich* only is mentioned. The statute 1 *Geo.* designed to instance in all the qualifications, and the omitting this is an argument, the law-makers esteemed it none, for the affirmative there implies a negative.

Mallett. The solemn league and covenant was an association, and no law. Necessity has superseded the express words of a statute; as where the statute of *Marleberge* prohibits the driving

diſtreſſes out of the county, yet where the lord's manor is in another county, it has been held lawful. In the caſe of *The King* v. *Jeffries* about a year ſince, ſuch a rule as this was diſcharged, becauſe the Attorney General had no hand in praying it.

Whitaker Serjeant *contra*. Every ſubject has a right to inform the court, whenever any other is guilty of a breach of the law. An information lies for not repairing a bridge, and yet there is no private injury. The ſtatute doth not require us to name a relator, till the information is actually granted. I agree the court has a diſcretionary power, either to grant or deny what we now aſk for.

It is a new doctrine which is now advanced, that if an act of Parliament be diſregarded for a time, it ceaſes to be binding. But if it ſhould, yet there is not that argument in this caſe. Daily experience tells us, that the ſacrament is taken as that ſtatute requires; and it is coupled with the declaration, and muſt ſtand and fall with it. The queſtion is not whether there are any perſons now alive who took the ſolemn league and covenant, but whether or no there remains any obligation at this day on members of corporations to make the declaration againſt it. My lord *Clarendon* was of opinion that the obligation was perpetual, as may be gathered from his own words, *To the end that we and our poſterity*. But not to reſt this matter upon the ſingle teſtimony of any hiſtorian, here is *teſtimonium rei*, the very words of the act of Parliament, which enacts, *That this declaration ſhall be made for ever hereafter*, and in default thereof the election to be void.

Whether the diſtemper be general or not, the court cannot take notice upon this motion: The only queſtion is, whether the defendant has complied with the terms of this act of Parliament, which we inſiſt is in full force.

Marſh. We need not pray this information through Mr. Attorney, for the ſtatute gives it to any perſon with leave of the court. And though *Jeffries*'s caſe ſeems to thwart us, yet the conſtant practice is more than an anſwer to the authority of that caſe. As to the affidavit, we think it ſufficient. We ſhew the defendant did not make the declaration when he took the oaths of office, which was the proper time; and this is enough to put him to ſhew, he took it at any other time and place. And ſince he has not laid hold of this opportunity, it may be concluded he has not taken it at all. That a tender was not neceſſary, was reſolved in *Slatford*'s caſe.

It

It has been said, that the reason of this provision was but temporary. In answer to which pretence I shall look a little into it, in order to shew, that as the obligation is perpetual, so is the reason of it. In 1643, the Parliament forces having had but ill success, they made application to the *Scots* for their assistance. Commissioners were appointed on both sides, and the result of their meeting was an association, which went under the name of the solemn league and covenant. The King immediately published his proclamation against it, as appears in 3 *Rush.* 488. The drift of this association was, to ruin the religion of our country; and to express the detestation of such abominable practices, the declaration was framed soon after the restoration. And it had two views, one to disengage people from that obligation which they were in a manner forced into, and the other to fix a lasting and indelible brand of infamy upon those proceedings, in order to deter others from the like attempts. And now can any one say the reason is but temporary? On the contrary, does it not manifestly appear to extend itself to all future ages?

As to the militia, there was no occasion for this provision: The crown had them in their power, but not so of the corporations. In 1 *Inst.* 81. *b.* it is said, an act of Parliament cannot be antiquated, or lose its force, for want of being put in execution. And *Hob.* 111. Sir *John Pilkington*'s case there cited, *Fortescue* C. J. said they would be well advised, before they would annul an act of Parliament. It is an absurdity to say, that because the subject has lived some time in the breach of any law, that the obligation to observe that law ceases. In *Henry* the 8th's time all the clergy were brought under a *præmunire*, for suing bulls from the court of *Rome*; and bishop *Burnet* in his *History of the Reformation*, speaking of this matter, tells us, That though it had been practised for a long time, to sue such bulls, yet the old laws prohibiting thereof were in no degree impeached by such usage. Act of Parliament cannot be antiquated.

Yorke. It is sufficient that we lay a probable cause before the court, when we pray this information. We were not obliged to travel the country, to inquire of every justice of the peace, whether the defendant had made any declaration before him. Nor does this cause come within the reason of returns, which were not traversable at common law, and therefore ought to be certain to every intent. The statute 9 *Ann* is general, and not confined to prosecutions by competitors only. I was of counsel in *Jeffries*'s case, and the reason why that information was refused was, because he proved he took the oaths about a fortnight after the proper time, and not because the prosecutor came without Mr. Attorney to back him. In the

case

case of *Denny* v. *Norris*, the question was not about the tender, but whether that matter was assignable for error. *Hale* in his *History of Law* 4, 5, 6. where he treats of old laws whereof no written monument is left, does not conclude them of no force; but only says they are grafted into the common law. In the case of *Thornby* v. *Fleetwood*, Serjeant *Cheshyre*, who argued *in C. B.* against the statute of 1 *Jac.* 1. *c.* 4. was pleased to use this metaphor, that it was a still-born statute, because says he it has not cried out till now: But that was not thought a reason to set it aside.

There is no more absurdity for people to take the declaration now than there was formerly, as to all persons who had not taken the covenant. But granting there may be some seeming absurdity, is it therefore to be disregarded? It may be a reason to have it repealed, but till then it binds. Suppose a statute requires, that whoever enjoys an office shall declare that two and two make four: I know of no power which could reject this as frivolous. The clause in the act of uniformity shews, that it would not have expired in 1682, without that provision, and there was no reason to continue it longer as to the clergy, for they take the oath of canonical obedience. It was said causes have been thought too big for this court: I grant it, and take this to be one of them; it is too big for this court to repeal and set aside acts of parliament.

Reeve. 2 *Inst.* 28. usage prevailed against a branch of *magna charta*.

The C. J. *Powys* and *Fortescue* Justices, held the affidavit sufficient, and that any private person might apply for the information. But *Eyre* J. was *contra* as to both. And as to the principal point, it was referred to the consideration of all the judges. But before they gave any opinion the act was passed for the establishing of corporations. 5 *Geo.* 1. *c.* 6.

5 Geo. c. 6.

Dominus Rex *versus* Smith.

Rule on justice to produce examination.

A Rule was moved for upon a justice of peace to produce an examination at a trial; and the court doubting, it was adjourned. And afterwards the C. J. delivered their opinion. Where things are evidence of themselves, as corporation books, we make no rule to produce them, but only that the party may have copies, which copies are evidence: But this examination is not evidence of itself, without proving the hand of the party; and so it is of warrants and affidavits, and therefore a copy of them is no evidence; and we must have the original, for nothing else concludes the party.

Make

Make the rule, that the justice *produci faciat* (not *quod producat*) the examination at the trial, and give the party a copy in the mean time.

Ogburn *versus* Berrington.

ERROR *e C. B.* Infancy assigned. *Doubt del court*, and feigned issue. Found with the plaintiff in error, and judgment reversed upon return of the *postea* upon motion without argument in the paper. But within a day or two after between — Practice.

Cunningham *versus* Houston.

ON error, want of an original and warrants of attorney were assigned. The defendant pleads a release of errors, and upon *non est factum* replied, the plaintiff was nonsuit. Thereupon I moved to affirm the judgment, but the court bid us put it in the paper; and when it came on, they objected against affirming the judgment, because the pleading the release was a confession of the errors, and so it would be to affirm an erroneous judgment. And besides, the tables were now turned; the question not being whether error or not, but whether barred or not by the release. I quoted *Aston's Entries* 339. where the entry is *quod judicium affirmetur*. But notwithstanding this, the court gave the judgment *quod querens nil capiat per breve de errore*, which I had before told my client was the proper way.

What judgment shall be given where a release of errors is found.

Show. 50.

Dominus Rex *versus* Beck.

HELD that there must be a formal conviction upon the statute of hawkers and pedlars, though it mentions nothing of it; and that a *certiorari* lies to bring it up hither.

Hawkers and pedlars. 8 & 9 W. 3. c. 25.

Ramsden *versus* Ambrose.

At Guildhall, November 21, 1718. coram Pratt *C. J.*

THE husband and wife lived separate. She boarded in the plaintiff's house, who declares against the husband for meat and drink for him found and provided. On the evidence it appeared to be for the wife. And the C. J. held, it did not support the declaration; for though the husband is chargeable upon his implied contract for what necessaries are administered to the wife; and therefore if goods are delivered to

Where husband and wife live separate, cannot declare for her board as for meat and drink for him found and provided.

to her, the vendor may declare generally for goods fold and delivered: Yet in this cafe the plaintiff fails in his defcription of the fubject-matter of the contract. So that where he now declares generally, a recovery in this action could not be pleaded to a fpecial action for meat and drink found and provided for the wife.

Amies *verfus* Stevens. Ibidem eodem die.

Carrier not anfwerable for goods loft by tempeft.
2 Ld. Raym. 918.

THE plaintiff puts goods on board the defendant's hoy, who was a common carrier. Coming through bridge, by a fudden guft of wind the hoy funk, and the goods were fpoiled. The plaintiff infifted, that the defendant fhould be liable, it being his careleffnefs in going through at fuch a time; and offered fome evidence, that if the hoy had been in good order, it would not have funk with the ftroke it received, and from thence inferred the defendant anfwerable for all accidents, which would not have happened to the goods in cafe they had been put into a better hoy. But the C. J. held the defendant not anfwerable, the damage being occafioned by the act of God. For though the defendant ought not to have ventured to fhoot the bridge, if the general bent of the weather had been tempeftuous; yet this being only a fudden guft of wind, had entirely differed the cafe: And no carrier is obliged to have a new carriage for every journey: It is fufficient if he provides one which, without any extraordinary accident (fuch as this was) will probably perform the journey.

Bufhel *verfus* Miller. Ibidem eodem die.

That which makes a man a trefpaffer may not amount to a converfion.

UPON the *Cuftom-houfe Key* there is a hut, where particular porters put in fmall parcels of goods, if the fhip is not ready to receive them when they are brought upon the *Key*. The porters, who have a right in this hut, have each particular boxes or cupboards, and as fuch the defendant had one. The plaintiff being one of the porters, puts in goods belonging to *A.* and lays them fo that the defendant could not get to his cheft without removing them. He accordingly does remove them about a yard from the place where they lay, towards the door, and without returning them into their place goes away, and the goods are loft. The plaintiff fatisfies *A.* of the value of the goods, and brings trover againft the defendant. And upon the trial two points were ruled by the C. J.

1. That the plaintiff having made fatisfaction to *A.* for the goods, had thereby acquired a fufficient property in them to maintain trover.

2. That

2. That here was no converſion in the defendant. The plaintiff by laying his goods where they obſtructed the defendant from going to his cheſt, was in that reſpect a wrong doer. The defendant had a right to remove the goods, ſo that thus far he was in no fault. Then as to the not returning the goods to the place where he found them; if this were an action of treſpaſs, perhaps it might be a doubt; but he was clear it could not amount to a converſion.

Fotheringham *verſus* Greenwood.

At Guildhall, 27 November 1718, coram Pratt, *C. J.*

A. Having money of the plaintiff's in his hands, loſes it at play. The plaintiff brings an action after the three months upon the ſtatute of gaming 9 *Ann. c.* 14. and produces *A.* as a witneſs. Upon a *voire dire* he confeſſed, that if the plaintiff recovered he was not to be anſwerable; but if he failed, then the money was to be deducted out of his fortune in the plaintiff's hands. *Et per* C. J. Though the recovery againſt the defendant will not ſink the demand for the money embezilled by *A.* yet his apprehenſion, that the plaintiff will not trouble him for it, is a biaſs upon him; for if a witneſs thinks himſelf intereſted in the queſtion, though in ſtrictneſs of law he is not, yet he ought not to be ſworn. And *Darnall* Serjeant mentioned the caſe of Mr. *Chapman* of *Bucks*, who owned himſelf to be under an honorary though not under a binding engagement, to pay the coſts; and *Parker* C. J. on ſolemn debate rejected him, and ſo it was done in this caſe.

He that apprehends himſelf intereſted, tho' *ſtricto jure* he is not, is no witneſs. Salk. 283. Sel. Caſ. Evid. 49. 12 Vin. Abr. 11. pl. 28.

Marks *verſus* Marks. In Canc.

Abr. Eq. Caſ. 106. 10 Mod. 419. S. C.

WILLIAM Marks having a wife and five ſons, *Theodore*, *William*, *Ezekiel*, *Daniel*, and *Nathaniel*, and being ſeiſed in fee of Lands in *Northamptonſhire*, and of the premiſſes in queſtion, 10 *April* 1680 conveyed the *Northamptonſhire* eſtate to truſtees, in truſt to ſell the ſame, and diſpoſe of the money according to the directions of his will, provided if *Theodore*, his heirs or aſſigns, ſhould within one month after his deceaſe pay 500*l.* as he ſhould direct by his will, then the truſt ſhould determine, and the lands remain to *Theodore* in fee. Afterwards he makes his will, and, reciting the truſt, diſpoſes of the 500*l.* to *William* and *Ezekiel* his ſons, and then deviſes the lands in queſtion

Deviſe to *A.* for life, remainder to *B.* in fee, provided that if *C.* within three months after *A.*'s death pays *B.* 500*l.* then *C.* to have the land in fee. *C.* dies living *A.* *A.* dies. The heir of *C.* (tho' not named) may tender. But if the law were otherwiſe, equity could not relieve by conſtruing the remainder to *B.* only as a ſecurity for the payment of money.

queſtion to *Anne* his wife for life, remainder to *Daniel* and his heirs; "provided that if my ſon *Nathaniel* do and ſhall within "three months after the deceaſe of my wife pay or cauſe to be "paid to *Daniel*, his executors or adminiſtrators, the ſum of "500*l.* then I give the land to *Nathaniel* and his heirs for "ever." The deviſor dies, the wife enters, and joins with *Daniel* in incumbrances. *Nathaniel* dies leaving the plaintiff his ſon and heir. The wife dies. And becauſe of the incumbrances the plaintiff, inſtead of tendring to *Daniel*, brings his bill in this court, to know where to pay the money.

Sir *Thomas Powys pro quer'*. The queſtion is, Whether the heir of *Nathaniel* can make the tender? I hold he may. In queen *Elizabeth*'s time executory deviſes came in. *Fulmerſton*'s caſe is the firſt, and they were allowed to extend as far as one life. Afterwards the houſe of lords in the caſe of *Lloyd* v. *Cary*, *Parliament Caſes* 137, allowed a reaſonable time after the life, *viz.* a year: We are within that time, for we come in three months. The objection is, That the tender is perſonal in *Nathaniel*, it not being ſaid, that he or his heir ſhall tender. To this I anſwer, That there is no laches in *Nathaniel*; it was not to be done in his life, but after the mother's death; and the heir having an intereſt, is within the reaſon of *Litt.* §. 334. Formerly it was thought, a fee could not be limited upon a fee, but it is otherwiſe ſince *Pell* and *Brown*'s caſe where the firſt fee is conditional. Though the eſtate itſelf never veſted in the anceſtor, yet an intereſt did; and therefore on performance of the condition the heir is in by deſcent, according to the third point in *Shelley*'s caſe, and the caſe of *Wood* there cited, and *Chapman*'s caſe, *Plowd.* 284. Thus far in a court of law: But in a court of equity, this ſhall be taken as an immediate deviſe to *Nathaniel*, ſubject to the payment of 500*l.* to *Daniel*, who has the former limitation only as a ſecurity, according to 1 *Chan. Caſ.* 89.

2 Cro. 592.

Cheſhyre Serjeant of the ſame ſide quoted *Litt.* §. 334. illuſtrated by §. 337. 1 *Roll. Abr.* 420. *Winch.* 103, 105, 115. *C. J. Jones* 390. And a caſe in *C. B.* debated *Mich.* 2 *W. & M.* and entered *Trin.* 4 *Jac.* 2. *rot.* 751 or 707. *R. H.* ſeiſed in fee made a feoffment to the uſe of himſelf for life, remainder to his wife for life, remainder to *Mary* in tail, remainder to *Sarah* in tail, remainder to his own right heirs; provided, that if *Mary* does not pay *Sarah* ſo much within ſuch a time after his wife's death, then *Sarah* ſhall have it in tail, remainder to *Mary* in tail. *R. H.* died, *Mary* died, and then the mother died; and it was adjudged, that *Mary*'s heir might pay the money, for the heir had an intereſt veſted, though the anceſtor died living the tenant for life.

Sir

Sir *Robert Raymond, ad idem.* The objection is, that *heirs* is a word of limitation, whereas the plaintiff if he takes now must take as a purchaser. Answer, he takes by descent. A possibility or remainder on contingency may descend. *Bro. Feoffment to uses* 59. 3 *Co.* 20. *Poll.* 55. *Co. Litt.* 219. *b.* *Daniel* has no prejudice, whether the 500 *l.* be paid by *Nathaniel* or his heir. The possibility is coupled with an interest. *Yelv.* 85. 7. So Sir *Francis Englefield*'s case; and we are in the case of a will, where the intent is to be pursued. 1 *Saund.* 150.

Hooper Serjeant *contra.* This is not an executory devise, which can take effect before any act done: The ancestor was to do an act, he dies without doing it; and as he could not take 'till he did the act, so the heir cannot now that it is impossible to be done in the manner the devisor directs.

Mead. There is a great difference, where the heir comes to perform a condition that is to put him into his ancestor's estate, and where he is to gain a new estate. It is admitted the plaintiff cannot take as a purchaser, and if so, then to make him take by descent, you must give something to the ancestor. Here he has nothing; he has no right to the land, but a bare *scintilla juris*, a right to do something, which will give him a title after it is done. And he had an election whether he would do it or not. It is considerable, that *Nathaniel* only is named to tender; but to *Daniel* are added *executors and administrators.* If *Nathaniel* had survived his wife, and lapsed the time; no body can say, the least right would have descended to the heir. This is a condition precedent, which ought to have been performed, and against this Chancery cannot relieve, as they can in the case of a condition subsequent; as was settled in the case of *Bertle* v. *Falkland, Salk.* 231. *Select Cases* 129.

Adjournatur. And afterwards the Lord Chancellor and the Master of the Rolls delivered their opinions *seriatim.*

Sir *Joseph Jekyll,* Master of the Rolls. The equity which brings this matter into the court is, that the defendant *Daniel* had so conveyed and incumbered this estate, that it became difficult for the plaintiff to know to whom to pay the money. Now before this can be settled, the court must first determine a question in law, whether the heir of *Nathaniel* upon tender or payment of the money may enter. And I am of opinion, that this is not personal to *Nathaniel,* but goes to his heir. If this was a condition at common law, there is no doubt but the heir might perform it and enter, *Litt.* §. 334. and in the case of a condition for payment of money at a certain time by the feoffee, who before the day enfeoffs another, the second feoffee may pay the money. *Litt.* §. 336.

K 2 But

But I admit the present case is not a condition, but an executory devise. But wherein does the difference consist? Al that it can amount to is only this. In the case of a conditioi the heir has a right antecedent to the condition to enter, fo he does not gain a new estate, but invests himself in the old one whereas in our case he is to gain a perfectly new estate, whicl the anceftor never had. In answer to this it is to be considered that there is a condition to create an estate, which the law will construe liberally. 1 *Inst.* 219. *b.* it is said a condition that is to create an estate, is to be performed as near the intent and meaning as can be, if the words and letter cannot be strictly pursued. From whence I observe, that there may be a performance which is not within the letter. But besides, this is the case of a will, in construction of which the law allows a great latitude to come at the meaning of the devisor. Now in our case his meaning seems to be this, upon a view of the whole will. He is distributing his estate amongst his children; to some, money, to others, land. In the proviso for *Theodore's* payment of 500 *l.* recited in the will, it is worded, *if* Theodore, *his heirs or assigns shall pay:* Now no one can imagine, that by the difference of words in that proviso, and this in question, the testator's intention was different. In both cases he seems to be aiming at a method of charging those several lands with 500 *l.* a-piece.

Let us now consider whether by this will *Nathaniel* himself had any thing in the lands in question. I conceive he had a future interest or possibility, which might descend to the heir, though that right never vested in the ancestor. That such a future interest in a term will go to the executor or administrator is known law. *Walden's* case in *Plowd.* 519. is full to that point. It may also be released, as in *Lampet's* case, 10 *Co.* 48. *b.* Now why such a future possibility should in a term go to the executor or administrator, and in a freehold not go to the heir, who is as much the representative of the ancestor as the other is of the testator, I cannot imagine. At common law such a possibility arising by act executed would come to the heir; as before the *stat. de donis*, the reversion upon a fee-simple conditional was only a possibility, and yet it went to the heir. And even a possibility may go to the heir, which never could vest in the ancestor, as 1 *Inst.* 378. *b.* So the same possibility will go to the heir, where the limitation is by way of use. 1 *Co.* 98. *Shelley's* case, and *Wood's* case there cited, are very strong. And though it is there said, that a future interest or possibility cannot be released, yet that was before *Lampet's* case, where it is determined that such a possibility may be released; and I believe it would be so now. The

case

case of *Spring* v. *Sir Julius Cæsar*, 1 *Roll. Abr.* 420 *Winch* 103. was thus: A fine by *A.* and *B.* to the use of *A.* in fee, if *B.* does not pay 10 *l.* at *Michaelmas* after, and if he does then pay it, it shall be to the use of *A.* for life, remainder to *B.* in fee: *B.* dies before *Michaelmas*, and *Rolle* says, it seems the heir of *B.* may pay the money, for this is not more personal, being the payment of money, than in the case of *Litt.* §. 334. upon a mortgage: And though in the report of this case in C. J. *Jones* 390. it is said, the court were divided: Yet *Croke* and *Jones* were of opinion, the performance of the condition was not personal; and they said, they did not see the difference between that case and the case of *Littleton*; and since that reason was not contradicted by any of the other Judges, and reported by *Rolle* as law, I must take it for law.

Now since these several possibilities are judged to go to the heir; I do not see why such possibility created by will, since executory devises are allowed, should not go to the heir also. The case of *Brett* v. *Rigden* cited for the defendant is nothing to the purpose, for there was in effect no devise to the ancestor, he dying in the life of the devisor; but in the present case here is a compleat devise and such as the ancestor might have taken.

It was insisted for the defendant, that the plaintiff's father had an election, to pay or not to pay the money; and therefore it is personal in him. I admit it; but then such election is always given in favour of him that is to pay, the receiver having no election at all; and in *Littleton*'s case the mortgagor has equally an election, and yet it is not personal in him. My Lord *Coke* in his comment upon that section gives four reasons for *Littleton*'s opinion, which all concur in the present case. 1. A day appointed. 2. If the heir in our case takes by this executory devise, (as has been shewn he does) in nature and course of a descent, it is the same thing as where in *Coke*'s second reason the condition descends to the heir. The two remaining ones are plainly the same in our case, and so *Littleton* is indeed a full authority in point.

It is not to be made a question, whether this future interest or possibility, being to arise beyond a life, is good by way of executory devise, since the case of *Lloyd* v. *Cary*, which allows a year after. Upon the whole I am of opinion with the plaintiff, as to the point of law.

It was insisted upon further for the plaintiff, that if the law were against him, yet in equity he would have a good title upon payment of the 500 *l.* the estate in *Daniel* being to be looked upon as a security only. And for this 1 *Chan. Ca.* 89. was cited. But now lest any one should go away with this

 dangerous

dangerous opinion, that another conſtruction ought to be made in a court of equity, than would be in a court of law; it is to be obſerved, that that caſe was of a truſt, and unleſs it was conſtrued as a truſt for the younger children, Sir *Thomas* would have run away with the whole eſtate.

Parker Lord Chancellor. I am of the ſame opinion with the Maſter of the Rolls. And if we look on this caſe on every ſide, it appears the right is clearly for the plaintiff. The will ſhews the intention; though the word *heirs* be left out in the caſe of *Nathaniel*, yet he ſhould be in the ſame condition with *Theodore*. The queſtion is indeed a queſtion of law, and the method I have taken to ſatisfy my ſelf has been by conſidering this proviſo; 1. As upon a feoffment; 2. As upon a will; and 3. As it would ſtand in equity, as a proviſion for payment of money.

1. At common law; if *William Marks* had made a feoffment to *B.* for life, remainder to *Daniel* in fee, with this proviſo; *Nathaniel* could take no benefit of this condition, becauſe contrary to a maxim in law, that a condition cannot limit over an eſtate to another, but can only be taken advantage of by the maker. But in caſe of a feoffment by *A.* to *B.* and his heirs, upon condition that if *A.* pays 500 *l.* to *B.* within three months, then *A* ſhall have his eſtate back again; if *A.* dies before the three months are expired, his heir, though not mentioned, may pay the money and enter. *Litt.* §. 334.

2. Conſider it upon the ſtatute of wills, and it is the ſame upon the ſtatute of uſes, ſince executory deviſes and ſpringing uſes have been allowed of. At firſt they began when merely future, and ſprang out of the eſtate of the deviſor. Afterwards they were extended beyond a life; as if an eſtate was deviſed to *A.* for life, remainder to *B.* in fee, upon condition that if *C.* pay a ſum of money to *B.* within a certain time after *A.*'s death, then *C.* to have a fee. This has been allowed of, and it is no more than granting the advantage of a condition to another perſon, which by common law conveyance could go only to the maker himſelf. Now this advantage is in it own nature deſcendible; becauſe it is nothing but that very right, which if it had gone to the deviſor himſelf, would have deſcended to his heirs. Take this as a poſſibility or future intereſt, and the caſes mentioned by the Maſter of the Rolls ſhew plainly, that this is a right deſcendible to the proper repreſentative, whether of a term or an inheritance, the former to the executor or adminiſtrator, and the latter to the heir. But if we conſider it (as I have done) as a condition; the caſe is yet ſtronger; becauſe this benefit of a condition is what is taken notice of before by the common law

2 to

to be descendible; and since by the statute of wills and uses the benefit of a condition is allowed to go over to a stranger, that stranger ought to have it as fully and compleatly as the feoffor himself would have at common law: That is, it shall go equally to the heirs of the one as of the other.

3. Consider the matter as it stands in a court of equity. I agree intirely, were the law against the plaintiff that he could not pay the money at the day; this court could not have intermeddled: But if the law be with him, it will be another consideration, whether if he slipped the time of payment, he should not be relieved. This is the case of a mortgage; equity looks upon the mortgagee's estate, which is become absolute by passing the day, as only a security for the money, and will therefore defeat it upon payment after the day. Now in our case *Daniel*'s interest is merely personal; by the will the money is to be paid to him or his executors, and the estate of inheritance is given to *Nathaniel* and his heirs, subject only to this incumbrance. And though this court has not relieved against an heir at law upon a condition precedent to raise estates out of the heir's estate; yet when it is to be raised only out of the estate of the devisee, it may very well do it. *Nathaniel* therefore would have the equity of redemption, the estate of *Daniel* being only as a security. If this therefore had been the case, I think this court would have relieved. But the present case does not want that assistance.

To return then to the question in law, whether the death of *Nathaniel* has destroyed the benefit of the condition as to his heir: And this contains two questions; 1. Whether this condition be such as may be performed after *Nathaniel*'s death; and 2. Whether the estate must not first vest in the ancestor, before the heir can take. As to the first, I think it not personal in *Nathaniel*, but performable by his heir. The payment of 10 *l.* or such small sum, that bears no proportion to the estate, may perhaps be considered only as a ceremony, to declare the intention of the party; and therefore if in the case of *Spring* v. *Sir Julius Cæsar*, the two Judges continued in their opinion, it must be, as I conceive, because the sum was so small, that they looked upon it as a meer ceremony. But where the sum is 500 *l.* it must be looked on as a certain valuable consideration; and since *Englefield*'s case in 2 *Co.* the payment of money is a thing of all things the least personal, it not being material who pays it, so it is but paid. If therefore the plaintiff pays the money, all the purposes of the will are answered, as fully as if *Nathaniel* himself had paid it. And this exactly answers to *Littleton*, and the reasons given by *Coke*, which are not adapted to the institution of the common law only, but to the reason of the thing. As to the second,

Wood's cafe in 1 *Co.* 99. *a.* proves evidently, that an heir may take by defcent by virtue only of a poffibility of right which was in the anceftor.

It has been objected, that this is a condition precedent: But I take it to be a condition fubfequent: It would indeed have been precedent, if it had been to raife an eftate out of the heir's eftate; but this is only to defeat *Daniel's* eftate, and then *Nathaniel* comes into the place of the heir at law. But this is a meer verbal difpute: No matter whether precedent or fubfequent, if the performance by the heir be to be looked upon as the performance of *Nathcniel*, it fhall have the fame effect as if *Nathaniel* himfelf had paid the money. I think therefore the plaintiff would have a good title at law on payment at the day. But yet he came very properly into this court, becaufe of the hazard he run in paying the 500*l.* to *Daniel.* There muft be a decree in nature of redemption, that is, that the plaintiff pay the principal, and intereft from the day of payment, and have the eftate conveyed to him. The money muft be brought before the Mafter, who muft fee what demands are upon it, and adjuft the proportions of the feveral claimants.

Philips *verfus* Smith.

Trin. 2 Geo. B. R. rot. 460.

Amendment. 7 & 8 W. 3. c. 25. Lill. Ent. 254. Com. Rep. 279, 285. 2 Vin. Abr. 388. pl. 18.

IN debt upon 7 & 8 *W.* 3. *c.* 25. againft the officer who prefided at the election of members of Parliament, for refufing to deliver a copy of the poll: After judgment for the plaintiff *in B. R.* and error brought in the Exchequer Chamber, the plaintiff moved to amend in feveral particulars, which he was ordered to give a note of to the other fide. And now they came to fhew caufe againft their being amended.

The firft amendment defired was in the warrant of attorney, where the defendant was ftiled bailiff *bugi* for *burgi.*

Cheshyre. There is nothing to amend this by, as there was in the cafe of *Coke* and *Dutchefs of Hamilton*, where they produced the common rule in ejectment, and that was the foundation for putting in the attorney's name.

2. To put the word *vic.* into the *diftringas.* It is *Rex fidei defenfor, &c. Somerfet' falutem*, omitting *vic.* There is likewise nothing to amend this by; no award of it upon the roll, as there is of the *venire facias.* And *non conftat*, but it might be defigned to be directed to the coroner.

3. The

3. They would amend the *teste* of the *venire*, which in other words is to solve a discontinuance. The award is *quindene Martini*, and they have taken it out *teste* the first day of *Hilary* term, and now they would *teste* it in *Michaelmas* term.

4. The other amendment they would make is, to add continuances. Of them they have no need, having a verdict, which cures the want of them.

Reeve. This is a proceeding upon a penal law, and therefore the court will be stricter than in common actions. And as the statutes of jeofails will not help them, they must shew it to be amendable at common law. In the case of the *Queen* and *Tuchin*, which was an information for a libel, where the *distringas* was *teste* the day after the return of the *venire*, the court on great debate refused an amendment. Salk. 51.

Wearg. The question is, whether this be a penal popular statute within the exception of the statutes of jeofails. I agree, where a man is intitled to an action at common law, and an act of parliament comes and gives him an increase of damages; that is not to be taken as a penal statute. 9 *Co*. 71. 3 *Bulst*. 378. But this is not that case. Any person who demands the poll may have the action if he be refused it, and that shews it to be a popular statute.

All amendments are either at common law or by statute. Nothing was amendable at common law, but the same term. 8 *Co*. *Blackmore's* case. *Salk*. 50. By 14 *E*. 3. *c*. 6. and 8 *H*. 6. *c*. 12. such faults only are amendable, as proceed from mistake, not ignorance; if the *teste* of a writ be after the return of it, that is a plain mistake, and amendable; but when a man designedly makes it *teste* of one term, when it ought to be of another; that is matter of judgment. *Show*. 80. The direction of a writ is a more essential part than the *teste* of it, or the return. It cannot be a writ unless it be directed to some body, but it may be good without a return, as where it is *vicontiel*. Where there were two sheriffs, and the writ was directed *vicecomiti*; there indeed it was made *vicecomitibus*, because there was a direction, though an improper one. 2 *Cro*. 188. *Yelv*. 110.

Yorke. At common law nothing was amendable, but the act of the court. If *vic*. is to be put in now, it will be giving an authority after the execution of it. In the case of *Sloper* v. *Child* in *Cro*. *Jac*. the word *vic*. was put in, but that was because the award of the *venire* warranted it, which the award here does not, for it is of a subsequent term, and at a time

when

when the defendant had no day in court. In *Cro. Eliz.* 82c the return of the *venire* was held amendable, but not the *tefl* becaufe that is never mentioned in the awarding it upon th roll.

Comyns Serjeant *contra.* The ftatutes of amendments do nc except popular actions, as the ftatutes of jeofails do. 3 *Lea* 375. In a *qui tam*, &c. on the ftatute 31 *Eliz.* for 5 *l.* fc felling a horfe in *Smithfield* not tolled, there was an amend ment. So *Salk.* 324. 1 *Roll. Abr.* 205. *pl.* 3. *Cro. Car.* 27 278. *Jones* 302. 1 *Roll. Abr.* 202. *pl.* 7. 1 *Brownl.* 15

Hutt. 56. upon the ftatute of hue and cry the day of committing th robbery was amended. It appears the writ was intended to b directed to the fheriff, for there is in it *com' tuo*, and there fore we may put in *vic.* according to *Yelv.* 69. *Cro. Ja* *Sloper* v. *Child.* So the *tefte* of writs have been amende 2 *Cro.* 442. *Yelv.* 64. *Cro. Car.* 38. 2 *Cro.* 64. 2 *Brown* 102. *Moor* 599. *Cro. El.* 183. *Moor* 684. *Cro. El.* 20 2 *Cro.* 162. *Moor* 465. *Cro. El.* 467. *Noy* 57. 2 *Jones* 4 And we may add the continuances according to 1 *Roll. Ab* 200, 205, 206. *pl.* 6.

Pengelly Serjeant. The crown has no part of this penalt but the party grieved has it all, and he has an antecede right before bringing the action, which a common inform has not. He fhall have cofts. 1 *Roll. Abr.* 516. *pl.* 5. S *William Jones* 447. 1 *Ven.* 133. *Cro. Car.* 539. As to th warrant of attorney, we needed not put in any addition. Th other is right, and that is fomething to amend by. Then to the *vic'*, this writ is returned by the fheriff; fo no colo to fay it might be intended to go to the coroner. *In C.* the laft term, between *Child* and *Sloper*, the *venire* was to t fheriff of *Warwickfhire*, and the *habeas corpora* to the fheriff *Nottingham*, and this was amended. 3 *Mod.* 78. So *Paf* 8 *W.* 3. *B. R. Wright* v. *Inhabitantes de Penhurft*, the *ven* was amended from *de placito hutefii et clamoris*, to *de plac tranfgr' et contempt'*, *contra ftatut' de Hue et cry.* As to t *tefte*, *vide Hardrefs* 321. 1 *Roll. Abr.* 201. *pl.* 36. *Cro.* 1 572. And the continuances being only matter of form, m be entered at any time. 1 *Roll. Abr.* 205. 2 *Cro.* 211.

The court doubted as to the continuances, but held all t reft amendable. And *Eyre* J. quoted *Kite* v. *Epifcopum Wi ceſter*, *Paf.* 7 *W.* 3. where one of the defendant's names w omitted in the *diftringas*, and it was amended after trial. *A journatur.* And afterwards, when it came on again, the cou declared for all the amendments, except the want of con nuances, which they had debated again. And for the amen ment the former arguments were infifted on; and 1 *R* *Ab*

Abr. 200. *pl.* 27. *Yel.* 156. 26 *H.* 6. *amendment* 33. were cited. In anſwer to which it was inſiſted, that continuances were the act of the court, and the ſtatute 8 *H.* 6. extends only to miſpriſions of the clerk. 8 *Co.* 156. *b.* *Stiles* 339. 3 *Lev.* 431. And towards the end of the term the Chief Juſtice delivered the opinion of the court, that the continuances might be entered at any time, as well after as before the judgment; and a diſtinction was taken between miniſterial and judicial acts, the firſt of which were at common law amendable at any time, but the latter not after the ſame term. And as to amendments of judicial acts, a difference was made between amendments which deface and alter the record, and ſuch as are only additional to it, in order to eke it out and compleat it.

Gould *verſus* Coulthurſt.

THE writ of error was *teſte* in *Hilary* term, of which the judgment was. But the plaintiff below enters continuances upon it till *Trinity* term, which occaſioned the writ of error to be quaſhed. And now the queſtion was as to coſts. And all the court agreed, that this not being a fault in the writ of error at the time of bringing it, but being occaſioned by the act of the defendant in error, which the plaintiff could neither foreſee nor prevent; it was not a caſe within the 4 *Ann.* c. 16. which gives coſts againſt the plaintiff in error upon quaſhing defective writs of error. Then another queſtion aroſe, whether the plaintiff in error ſhould not have his coſts in this caſe, being defeated of the benefit of this writ of error by the artifice of the defendant in error. And as to this point the C. J. and *Eyre* J. were againſt giving coſts, and *Powys* and *Forteſcue*, Juſtices, were of the contrary opinion: So the court being divided, the writ was quaſhed without coſts of either ſide.

Writ of error quaſhed without coſts.

4 Ann. c. 16.

Dominus Rex *verſus* Turner & al'.

THE defendants having been indicted for a riot in entering into a room, they came in and confeſſed the indictment, and moved to ſubmit to a ſmall fine. The proſecutor, to aggravate the fine, produced affidavits, that a young gentleman, who was then in the room and ill of the ſmall pox, was ſo frightned, that he died; though he was in a very good way before. And whether theſe affidavits could be read upon this indictment, was the queſtion.

What conſequences ſhall be conſidered in aggravation of a fine.

Eyre J. was againſt the reading of them, becauſe it was an injury to a third perſon, and no mention of it in the indictment.

ment. If in trefpafs the plaintiff would give beating his fer-vants in aggravation of damages, it muft be laid in the decla-claration. And he mentioned the cafe of *Rex* v. *North & al'* 9 *W.* 3. *in B. R.* where in an indictment againft feveral jour-neymen weavers for a riot, the circumftance of their meeting in order to oblige their mafters to raife their wages, was no allowed to be given in evidence, not being laid in the indict-ment.

But the C. J. and *Powys* and *Fortefcue* Juftices, were for reading the affidavits, becaufe this was the immediate confe-quence of the riot, and could not fubfift as a crime of itfelf. And if it was otherwife, every man muft make his indictment as long as his evidence. Befides, why are affidavits ever read, unlefs it be to inform the court of circumftances, that cannot appear upon the general allegation of the crime? They faid, the true diftinction was, where the matter can or cannot fub-fift as a diftinct crime by itfelf: The combination of the wea-vers was a confpiracy, which is a crime indictable; and it would have been hard to fine them upon that account, and yet leave them open to be indicted for a confpiracy. In an indictment for a riot in breaking windows, *Holt* C. J. let them in to fhew, that it was becaufe the profecutor had put out illuminations for the peace of *Ryfwick*. If circumftances are not to be confidered, the punifhment for a riot muft be the fame in all cafes, which would be highly unreafonable. The affidavits were read.

Hilary

Hilary Term.

5 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Justice.*
Sir Littleton Powys, *Knt.* }
Sir Robert Eyre, *Knt.* } *Justices.*
Sir John Fortefcue Aland, *Knt.* }
Nicholas Lechmere, *Efq; Attorney General.*
Sir William Thomfon, *Knt. Solicitor General.*

King qui tam *verfus* Bolton. Ante 117.

THE defendant having brought error in Parliament, the record was tranfcribed; and as it was carrying to the Houfe of Lords, the original was picked out of the officer's pocket: The Houfe of Lords received the tranfcript, without examining it. And now this court ordered a new entry to be made. They were attended in vacation at their chambers, but faid they could not do it there. And afterwards the judgment of *B. R.* was affirmed in Parliament. And *Pafch.* 9 *Geo. B. R. Inter Needham et Grano*, the like leave was given, on a lofs of the roll by the attorney. Lofs of record fupplied by a new entry. Lill. Ent. 523.

Chartres *verfus* Cufaick.

ERROR out of the King's Bench in *Ireland* of an affirmance of a judgment in *C. B.* there; and want of warrants of attorney on the writ of error in *B. R.* were affigned. And the Affignment of errors fet afide.

court

court ſet the aſſignment of errors aſide; and ſaid it had bee done ſo ſeveral times, upon account of the delay which woul follow upon awarding *Certiorari's*. And the caſe of *The King* v *Epiſcopum Midon.* was mentioned for that purpoſe.

Anonymous.

Bringing money into court.

IN trover for money, the court gave leave to bring the whol money declared for into court. But ſaid they could do i only in this caſe, and not in trover for goods.

Morgan *verſus* Williams.

Words actionable.

IN caſe for theſe words, *Thou art a thief. Of what? Of ever thing.* After a verdict for the plaintiff, *Whitacre* moved i arreſt of judgment, becauſe the plaintiff could not be a thief o every thing, for ſtealing fruit off the trees is not felony. *Se per Curiam:* It muſt be intended to be of every thing he ca be a thief of. *Judicium pro quer'.*

Dominus Rex *verſus* Inhabitantes de Witham ſuper Montem.

What a good adjudication.

PER *Curiam: It appearing to us, that he is likely to becom chargeable*, is ſufficient, without ſaying *to the pariſh from whence removed*; for it is not to give a juriſdiction, but only the reaſon of the judgment.

Dominus Rex *verſus* Leonard.

Commitment by rule of court not within the *habeas corpus* act.

THE defendant in the long vacation was committed by warrant from the Secretary of State for high treaſon. He lay by all *Michaelmas* term till the laſt day, and being then brought up, he was charged with an indictment, and recommitted by rule of court. The firſt week in this term he applied to enter his prayer upon the *habeas corpus* act; which the C. J. thought he might well do, for though he has lapſed the time upon the firſt commitment, yet that is now out of the caſe, and he ſtands upon the ſame terms with one originally committed ſince the laſt term. And though the ſtatute has only the word *warrant*, yet he took commitments by rule of court to be within the meaning of it, this being an act for the liberty of the ſubject, and never intended to leave an indefinite power any where. *Sed Eyre et Forteſcue* Juſtices (*Powys J. abſente*) were of a contrary opinion, and ſaid it had been otherwiſe reſolved at the *Old Bailey.*

Baily. Then the Chief Juſtice propoſed to enter the prayer *de bene eſſe*, and conſider the validity of it afterwards; as was done in *Bernardi's* caſe, who at the end of the term was refuſed to be bailed, notwithſtanding his prayer was regularly entered; that entry being no eſtoppel to the court. But the others would not come into this, and ſo nothing was done. The counſel prayed that ſome *memorandum* might be made of this application, *ſed non praevaluit*.

Bernardi's caſe. 10 St. Tri. Ap. 64.

Dominus Rex *verſus* Gill.

PER *Curiam*: It has been ſo often reſolved, that the ſeſſions has an original juriſdiction, to diſcharge apprentices; that we will not ſuffer it now to be made a queſtion, though it might be doubtful upon the ſtatute itſelf. But in theſe orders it muſt be ſet forth, that the maſter appeared or was ſummoned, as was held, *Paſch*. 10 *Annae*, *Regina* v. *Rutter*, and for want of this the order was quaſhed.

Seſſion has an original juriſdiction to diſcharge apprentices. Salk. 67, 68, 491. 1 Vent. 174. 5 Eliz. c. 4. § 35. Seſſ. Caſ. 113.

Between the Pariſhes of Coombe *and* Weſtwoodhay.

IN 1715, *Michaelmas-day* happened to be of a *Thurſday*. A man was hired upon the *Saturday* following, to ſerve from *the ſaid Thurſday after Michaelmas-day* to *Michaelmas* following. All this was ſtated for the opinion of the court. And the firſt queſtion was, whether there was a compleat * hiring for a year: for if the word *ſaid* be rejected, then there wants a week, but if you keep it in and refer it to *Michaelmas-day*, then by rejecting the words *after Michaelmas-day* it will ſtand as a hiring from one *Michaelmas* to another. And *Eyre* J. thought it might well be ſo. *Sed caeteri contra*: for it would be to make it nonſenſe, in contracting to ſerve for a time paſt; whereas if the word *ſaid* be rejected, the reſt is natural enough. The other queſtion was, whether (admitting the hiring to be compleat) there was † any ſervice for a year in purſuance of it as the ſtatute requires, the contract being made upon the *Saturday*. And *Eyre* J. ſaid it might be intended he was thoſe two days upon trial, and ſo the ſervice would be ſufficient. But the reſt held, that ſuch a ſervice would ſignify nothing; for it is not in purſuance of any hiring; there muſt firſt be an hiring, and then a ſervice; and not *vice verſa*, a ſervice, and then a hiring.

There muſt be a compleat hiring and ſervice for a year to gain a ſettlement.

* See *ante* 85.

† A *bona fide* ſervice, fairly and without fraud, is to be favoured. 2 Bur. Rep. 945. See Bur. Rep. 371.

Thatcher *versus* Stephenson.

Practice.

ERROR *coram vobis*, and infancy assigned: A *scire fa* *ad audiendum errores*, and a *scire feci* returned. The fendant did not appear and join in error, and the plaintiff plied to the court to know what to do; and they directed l to put it in the paper, without taking out any rule to join error. And when it came on the judgment was reversed.

Morris *versus* Nixon. In Canc.

Fraudulent remainder set aside in equity.

ON a treaty of marriage the attorney for the lady told intended husband, that his client desired a remainder mi be limited to him. The husband consented; and when the tlement was read before execution, the lady objected to this mainder; whereupon the gentleman acquainted her, that it done at her request, which she denied. But however, it be a remote remainder, and they unwilling to defer the mat the writings were executed. And a bill was brought in t court, where the remainder was set aside as a fraud and im sition.

Dominus Rex *versus* Cope et al'.

At Nisi prius *in* Middlesex, coram Pratt, *C. J.*

What is evidence of a conspiracy.

THE husband and wife and servants were indicted fo conspiracy to ruin the trade of the prosecutor, who the King's card-maker. The evidence against them was, t they had at several times given money to the prosecutor's prentices to put grease into the paste, which had spoiled cards. But there was no account given, that ever more than at a time were present, though it was proved they had all gi money in their turns. It was objected, that this could not a conspiracy, for two men might do the same thing with having any previous communication with one another. But Chief Justice ruled, that the defendants being all of a fam and concerned in making of cards; it would amount to e dence of a conspiracy, and directed the jury accordingly.

Tichbu

Titchburne *versus* White.

At Guildhall, coram King, *C. J.* de C. B. 16 Febr. 1718.

PER King, C. J. If a box is delivered generally to a carrier, and he accepts it; he is anſwerable, * though the party did not tell him there is money in it. But if the carrier aſks, and the other ſays no, or if he accepts it conditionally, provided there is no money in it, in either of theſe caſes I hold the carrier is not liable. *Allen* 93.

What acceptance makes the carrier liable.

* See 4 *Burr.* Rep. 4298.

Catten *versus* Barwick.

At a Court of Delegates in Serjeants-inn *in* Fleet-ſtreet, 27 February 1718.

BY the 89th canon churchwardens are to be choſen by the parſon and pariſhioners jointly, and if they cannot agree, then one by the parſon and the other by the pariſhioners. In the pariſh of *Bridge*——in *Yorkſhire* the cuſtom is, for the parſon to appoint one, and the two old churchwardens the other, but it goes no farther. In this caſe the two churchwardens could not agree, ſo one preſents *Barwick*, and the pariſhioners at large chuſe *Catten*. It was inſiſted for *Barwick*, that his caſe was like that of coparceners, where if they diſagree the ordinary may admit the preſentee of which he will, except the eldeſt alone preſents. On the other ſide it was ſaid, that the caſes widely differed, for in the caſe of a preſentment the ordinary has a power to refuſe, but he has not ſo in the caſe of churchwardens, for they are a corporation at common law, and more a temporal than a ſpiritual officer. And a caſe was cited to be adjudged in *B. R.* where to a *mandamus* to ſwear in a churchwarden the ordinary returned, that he was *ſervus minime idoneus*, &c. But a peremptory *mandamus* was granted, becauſe the ordinary was not a judge in that caſe.

Where cuſtom in chuſing churchwardens cannot take place, they muſt reſort to the canon.

The court held, that by this diſagreement the cuſtom was laid out of the caſe; and then they muſt reſort to the canon, under which *Catten* being duly elected, they decreed for him. 60 *l.* Coſts.

Dominus Rex *versus* Hare and Mann. In Canc.

Scire facias returnable *ubicunque* generally is good, without limiting it to *England*.

SCIRE *facias* out of the petty bag to repeal letters patents returnable *coram nobis in Cancellaria nostra in octabis purificationis beatae Mariae virginis ubicunque tunc fuerit.* The defendants, *salvis*, &c. pray oyer of the writ, and then plead in abatement, that the writ ought to have been returnable *coram domin. Rege in Cancellaria sua ubicunque eadem Cancellaria tunc foret in Anglia*, and not generally *ubicunque tunc foret.* To this the Attorney General demurs.

Bootle pro Rege. The objection which the defendants now make by their plea, strikes at all the forms of writs which have eve been in this court; for we shall shew that this is not only consonant to the *Register*, but is in the continued uniform course o the court.

We begin in the time of *Edward* the third, and shall shew instances in that reign, *Rich.* 2. *Hen.* 4. *Hen.* 6. Q. *Eliz* *Car.* 2. and *Jac.* 2. and even down to the union, and eve since the union except in two or three instances, which we a not at a loss to account for. *Register* 150. The Prince's case and the case of *Jefferson* v. *Morton*.

1 Saund. 27.

There was a case which gave heart and encouragement t this exception, *Hil.* 9 *Ann. in Chan. Regina* v. *Persehouse*: The the writ was *ubicunque tunc fuerit in Magna Britannia*, and it w abated by plea; and the reason was, because it differed from t *Register*, and was contrary to the act for the union of the tw kingdoms.

The instances I hinted at before, that run counter to all t other precedents, were subsequent to that resolution; and fro some expressions which were used in the arguing of that caus it was thought proper *in majorem cautelam* to make some fe writs returnable *ubicunque tunc fuerit in Anglia.* But surely wh was done in a few instances out of abundant caution, can nev be of force enough to overthrow that multitude of preceden and of so great antiquity.

Yorke contra. This depends, 1. upon the reason of the thin and 2. upon the precedents.

For I must agree, that though the reason of the thing with us, yet if to determine this writ to be wrong would be overthrow a multitude of judgments; then unless I could ma

soi

some distinction that could preserve those judgments, it would be difficult for us to prevail in this exception. But I take it there is no such danger.

Upon the reason of the thing, the nature of writs, and the common grounds upon which they have been settled, I must insist, that the return of this writ ought to have been, for the party to appear at the day before the king in his Chancery wheresoever it should be in *England*, and not generally *ubicunque tunc fuerit*.

There are several certainties which a writ ought to contain, with regard to the defendant, and in which he is concerned. 1. A command to a proper officer to warn the party to appear, either by summons or attachment. 2. The cause in which he is to appear. 3. The time when. And 4. The place where he is to appear. And if any of these fail, the writ will not be good.

1. As to the first: If the writ doth not contain that, it is a nullity; for it can answer no purpose, nor tend to any effect at all. And where the writ contains an improper direction in that particular, as where it has been a summons instead of an attachment, or an attachment instead of a summons, the books are full of cases of writs that have abated for that reason.

2. The cause in which he is demanded to appear must also be sufficiently described. If none be contained in it, then there is no charge against him in court, but he ought to be dismissed. And if it be not described with competent certainty, nay, in all formed writs, if it be not set forth in such and such precise words, as in case the particulars are ranged in an improper order only, that is error, and the writ shall abate for that cause.

3. The day upon which he is to appear must also be prescribed to him, and that with the most exact certainty; that he may know when to pay due obedience to the king's court, and be under no peril of incurring a contempt. And as this must be set forth with great certainty, so it must be with the known legal description of the day when he is required to appear; and if it be not, the writ is vicious, and abateable for that reason. *Trin.* 25 *Edw.* 3. 47. So *Pasch.* 1 *Geo. in B. R. Tilden* v. *Wheadon*. That was a *scire facias* against bail, returnable *die jovis prox. post crastinum purificationis*; whereas *crastinum purificationis* itself was on a *Thursday*, and before the *Thursday* following *octab' purificationis* intervened, so that was *dies jovis prox. post octabas purificationis* according to the proper description, though in fact it was the next *Thursday* after *crastinum purificationis*. An exception was taken to the writ for this reason, and the court were at first doubtful, whether it

 might

might not be well enough, becaufe though the ufual way is to take the defcription of days from the relation they bear to the laft common return, yet a writ may be made returnable at any day in the King's Bench, where the proceedings are *de die in diem*, and there was in fact fuch a day as *Thurfday* next after *craftinum purificationis*, and that was a fufficient defcription for the defendant to know it by, and confequently to know when to come in. But after argument and confideration the court held the writ ill, and that they could not vary from their certain known defcription of return-days and that writ was abated.

I have laid thefe matters before the court, to fhew how jealous the judges of the common law have always been in thefe cafes, and with what great care they have always preferved the exact certainty of writs and their returns. And I have made it preparatory to the fourth particular, which is,

4. The court and place where the defendant is to appear. As no reafon can be affigned, why the fame exactnefs fhould not go through the whole, and extend to the place of the defendant's appearance, as well as the time; fo I muft fay, that equal certainty has been required in that alfo.

The inftances, wherein writs have been excepted to for faults in defcribing the place of the return, cannot be expected to be many; becaufe the form of that is fhort and eafily learned; therefore as foon as clerks know any thing, they know that. And I muft own I have not been able to find any cafes in the books, where exceptions have been taken to original writs for an improper defcription of the place of the return. And I would make ufe of this as an argument for me, that they have been preferved up to that exquifite certainty, that there has fcarce been any poffibility of miftake. Therefore I rely upon this, till the other fide produce cafes wherein writs that have materially varied in that particular have been allowed to be good.

The principal queftion therefore will be this, whether here is fuch a certainty in the defcription of the place (of the return) in which the party is to appear, in this writ, as is agreeable to the rules of law. And I apprehend here is not.

In order to clear my way to that which is the proper confideration of this cafe, I muft in the firft place rid my hands of that load of ancient precedents, which is laid upon us. I muft agree that they are for the moft part as has been urged on the other fide, and therefore fhall give up all the precedents tha

that were before the union: And what I ſhall rely upon as the foundation of this exception is the union of the two kingdoms.

That ſince the conjunction of the two kingdoms of *England* and *Scotland* into the united kingdom of *Great Britain*, ſuch a material change has been wrought in the juriſdiction of this court, and the extent of it, that in all writs concerning *Engliſh* ſubjects returnable here, it ought to be *ubicunque tunc fuerit in Anglia*, confining it to that part of the united kingdom called *England* only.

By the 24th article of the treaty of union, which is confirmed by 5 *Ann*. *c*. 8. it is provided, "That from and after the union 5 An. c. 8.
"there ſhall be one great ſeal for the united kingdom of *Great* "*Britain*, which ſhall be different from the great ſeal now uſed "in either kingdom."

After this union the kingdoms of *England* and *Scotland* are no more. It is the crown and kingdom of *Great Britain*, and the ſeal of *Great Britain*, and is ſo ſtiled in all pleadings. In conſequence of that this court is alſo the Chancery of *Great Britain*, and ſo has been the ſtile of all bills exhibited in this court ſince the union.

As this alteration of names has been wrought, ſo there is a great and material change in things themſelves. Before the union the Lord Chancellor that ſat in this court, could iſſue no writ or inſtrument under the great ſeal, that could have any force in *Scotland*. There was then a great ſeal of that kingdom, and a Lord Chancellor who had the cuſtody of it.

Since the union that ſeal is diſannulled, and that office extinct. The general authority which it had is now veſted in the great ſeal of *Great Britain*, except in the inſtances particularly excepted and reſerved by the articles of union.

If ſo, then this court is the Chancery of *Great Britain*, and has a general juriſdiction throughout the whole united kingdom, as it had throughout *England* before the union.

The conſequence of this court's having a general juriſdiction throughout *England* before the union was, that it might exiſt and be a Chancery in any part of *England*. And by parity of reaſon, the conſequence of this court's having a general juriſdiction throughout *Great Britain* will be, that it may exiſt and be a Chancery in any place of *Great Britain*.

 From

From hence it will follow, that it may be in *Scotland*, and then this writ requiring the defendant to appear at the day of the return before the King in his Chancery, wheresoever that Chancery ſhould then be, did require the defendant to appear in *Scotland* at that day, in caſe the Chancery had been in *Scotland*.

That I take it is ſuch an objection to this writ, as will make it illegal, and be ſufficient to abate it: It is to compel an *Engliſh* ſubject to appear out of *England:* And that by the laws of *England* no *Engliſh* ſubject whatſoever can be compelled to appear to anſwer for a matter of right out of *England*, is a principle of law which cannot be diſputed. The ſtate of the union has made no change at all in this particular, but the law of *England* is ſtill *lex terrae* as *magna charta* ſtiles it, and it is to be executed within this land of *England*.

In order to explain and enforce what I mean, when I ſay the court of Chancery may by poſſibility exiſt in *Scotland*, I muſt examine a little the foundation of that matter.

The juriſdiction of this court is of a complicated nature, and includes in it great variety. But I muſt ſubmit, whether that whole juriſdiction, that great diverſity of power, which it has, does not flow from one ſpring, and is raiſed upon one general foundation, that is the *great ſeal*. 1. If it be conſidered as a court of ſtate, where all publick acts of government are ſealed and inrolled; that manifeſtly comes from the great ſeal, which is what gives them their legal authority.

2. If it be conſidered as an *officina juſtitiae*, for the iſſuing of writs; that certainly comes from the ſeal, which gives them being.

Of the original of the equity juriſdiction in Chancery.

3. The juriſdiction of this court, as it is a court of equity, is perhaps of all others the moſt difficult to be traced, both as to its foundation, and the time when it had its original. But I think there have been very great opinions, and I am apt to believe a ſtrict ſearch into antiquity might enable one to ſhew, that this juriſdiction alſo has taken its riſe from the great ſeal. For the Chancery being upon the diviſion of the King's courts naturally the *officina juſtitiae*, from which all original writs iſſued, and where the ſubject was to come for remedy in all caſes; the Chancellor was applied to in all caſes, for proper writs, where the ſubject wanted a remedy for his right, or redreſs for a wrong that had been done him. But in the execution of this authority, he was confined by the rules of the common law, and could

could award no writs, but such as the common law warranted: Therefore when such a case came before him, as was matter of trust, fraud, or accident, (which are the subjects of an equity jurisdiction) the Chancellor could award no writ proper for the plaintiff's case, because the common law afforded no remedy. Upon this it is not improbable, that the Chancellors who were most commonly churchmen, men of conscience, when they found those cases grew numerous, in order to prevent the suiters from being ruined against right and conscience, and that no man might go away from the King's court without some relief, summoned the parties before them, and partly by their authority, and partly by their admonitions, laid it upon the conscience of the wrong doer to do right.

4. If it be considered as a court of common law, as the petty bag is in which we now are; the principal parts of that jurisdiction are to hold plea upon writs of *scire facias* on records of this court, upon *monstrans de droit*, and traverses of offices found upon writs issued out of this court. These likewise have their being and essence from the great seal. And this very proceeding in a *scire facias* to repeal letters patent, which my Lord *Coke* says in 4 *Inst.* is the highest point of a Chancellor's jurisdiction, is in a particular manner derived from the great seal; for the very end of the suit is, and so is the judgment, that they be recalled back into the same place from whence they went forth under the great seal, that they may be cancelled, that is, that the great seal may be taken off. In the case of the *Mayor and burgesses of Leverpoole* against *the Chancellor of the county palatine of Lancaster in B. R. Trin.* 12 *Ann.* there was a *scire facias* to repeal a charter granted to that corporation under the great seal of the county palatine. To this suit a prohibition was moved for, for want of jurisdiction in the court. But it was resolved, that that court had jurisdiction of the cause, and amongst other reasons which were given for that judgment, it was declared, that this authority was incident to the seal of the county palatine: That the complaint of the writ being, that the Chancellor had wrongfully put the seal to it; it was proper to be examined in that court, where the seal was kept. Of the court of Chancery considered as a court of common law.

I have mentioned these matters in order to shew, how rationally and naturally all this power of the court flows from the seal. But there is another matter which furnishes the strongest argument in the world that it is so, and that is, that the delivery of the seal constitutes that great officer who exercises this jurisdiction, and gives him all this power.

The use I would make of this is, that if all the jurisdiction of the court of Chancery is founded upon the great seal; I ap-

 prehend,

prehend, that it will alſo follow and attend upon it; and th wheresſoever in any part of *Great Britain* the law can take n tice of the great ſeal of *Great Britain* to be, there is alſo t Chancery of *Great Britain*.

Suppoſe his Majeſty ſhould take a royal progreſs into *Sco land*, and amongſt his miniſters ſhould take his Lord Cha cellor along with him with the great ſeal: I muſt inſiſt, as conſequence of my argument, *there* would be the Chancery *Great Britain*. And what ſhews this more fully is, that t great ſeal might be put to writs there, and they would bear *te* in the King's name *teſte meipſo*: Nay, they muſt bear *teſte* in h Majeſty's own name, and no other, for a *cuſtos Regni*, or Lor Juſtices, can only be appointed, when his Majeſty goes out his kingdom; and the very moment he returns, their auth rity ceaſes. But ſince the union, when his Majeſty is in *Sco land*, he is ſtill within his united kingdom; and then by la there is no room for ſuch officers. And if writs may iſſ from *Edinburgh* under the great ſeal of *Great Britain*, teſted the King's name; that is a full evidence, that the Chancery *Great Britain may be there*.

But ſtill I muſt inſiſt, that by the law of *England* the ſu jects of *England* cannot be called to appear in the Chancery *Great Britain* whereſoever it ſhall be; ſince as that may be *Scotland*, it may require him to appear contrary to the law the land, and is therefore a bad writ.

I have now done with thoſe arguments, which I have prove this writ to be wrong, from the reaſon of the thing. come now to conſider the precedents. And as to thoſe whi were before the union, they are undoubtedly as has been ope ed; they have authority, and they have almoſt univerſal co ſent of their ſide; and they were certainly right, and ſettl upon very good reaſon. But what I ſhall contend for is, th this form is now bad and erroneous, upon the failing of th reaſon, for which, before the union, it was good. Th were good before the union upon this reaſon, that the law to notice that *England* was an intire ſeparate kingdom of itſe that the great ſeal was the great ſeal of *England*, and the Cha cery, the Chancery of *England*, and that the Chancery of *En land* could not be out of the kingdom; and therefore it w impoſſible to ſay, that this was to ſummon the ſubject to a pear out of *England*. But now the very contrary to this hol true; that the law takes notice, that *England* is no inti kingdom, but a part of *Great Britain* only; that the Cha cery is the Chancery of *Great Britain*, and may have a bei out of *England* in any other part of *Great Britain*. So th the reaſon and the preſumption of law, upon which that a

cic

cient form and thofe precedents were eftablifhed, now failing, and turning the quite contrary way; that form and thofe precedents will be of no authority againft me in this cafe; but will rather be authorities for me, becaufe nothing is more certain in reafoning, than that from foundations and premiffes, which are contrary one to another, contrary conclufions ought to be inferred.

As to the precedents fince the union, they are either fuch as have paffed of courfe in the office, *fub filentio*, without examination; or they are fuch as have come in judgment before the court, and undergone litigation, that is, judicial precedents.

Now as to the firft kind of precedents, of what authority are they? Surely they are of little or no authority. They are the work of clerks in the office, without confideration, and without knowing the opinion of the court. And if fuch precedents were fuffered to prevail againft the reafon of the law, that would be to fuffer the clerks to make the law. All the precedents which have been produced on the other fide are of this kind, and they have not fhewn any one judicial precedent in their favour, the reafon of which is, that there are none.

But I apprehend the ftrength and weight of the precedents are with us. I have in my hand a lift of near thirty writs upon the files of the petty bag, iffued fince the union, which are all made returnable *in Cancellar' ubicunque tunc fuerit in Anglia*, in the manner we contend for; and I have alfo a judicial precedent, a judgment of the court in a cafe of this kind, which I take to be an authority in point for me. And I am the more encouraged to think fo, becaufe the other fide have thought fit to anticipate me in it, it glared them fo full in the face. That was a *fcire facias* againft Sir *Cleave Moor* and *Peter Perfehoufe* upon a recognizance, given in this court, made returnable *coram Domina Regina in Canc' fua ubicunque tunc fuerit in Magna Britannia*. It was *tefte* 11 *Jan. anno* 9th of the late Queen. To this writ there was a plea in abatement, and Mr. Attorney General, that now is, took an exception, that it was wrong, and ought to have been made *coram Domina Regina in Canc' fua ubicunque tunc fuerit in Anglia*. And he put feveral cafes, where fince the union the great feal, and confequently the Chancery, might poffibly be out of *England*, and yet the fubjects of *England* not obliged to appear there. And that exception made fo great an impreffion upon the court, that my Lord *Harcourt*, who then fat here, abated that writ for this fault only. And what explains this authority further is, what was done upon it afterwards in conformity to that judgment and the opinion which was then

then delivered; for the new writ was not made returnable *in Canc' ubicunque tunc fuerit* generally, but *ubicunque tunc fuerit in Anglia*, as we contend this ought to be.

And really I am at a loss to find any ground, upon which the present case can be distinguished out of that authority. For why was the writ in *Persehouse*'s case held bad? was it not because since the union the Chancery of *Great Britain* may be in any place of *Great Britain*, and consequently a writ which required the party to appear in that Chancery, wheresoever it should be in *Great Britain*, required him to appear in *Scotland*, in case it should be there. So in the present case, shall not this writ *pari ratione* be bad, because since the union the Chancery of *Great Britain* may be in any place in *Great Britain*; and consequently this writ, requiring the party to appear in that Chancery wheresoever it shall be, requires him to appear in *Scotland*, in case it shall be there. I own I cannot discern any difference between the two cases.

By this time I hope it sufficiently appears, that I was well warranted in saying, that the strength and weight of the precedents is with us. For if the precedents *sub silentio* are both ways, and there be no judicial precedent with the other side, but there is one in our favour; that judicial precedent will turn the scale, and over-balance the rest; especially if the circumstances, even of our precedents which have passed *sub silentio*, are considered. For they have most of them, if not all, been since the judgment of the court in that case of *Persehouse*, which shews what was then apprehended to be laid down as the standing rule of the court for the future. And I am informed, they are all the cases since that judgment, which have been of considerable consequence, and can be supposed to have undergone the consideration of counsel. And some of them have been litigated, and come before the court upon other points. Amongst the rest, there is the great case of the *Scire facias* against the charter of *Leverpoole*, which caused a mighty struggle in *Westminster-hall*, and there the return is confined to *England*.

In order to avoid the force of this argument in the present case, some objections have been made of the other side.

Where erroneous process is aided by appearance, and where not.

The first is, that our exception comes too late, for that it is now aided by the appearance of the defendant. And this was enforced by observing, that it was absurd to say this defendant had an hardship put upon him by being summoned to appear in *Scotland*, when the court was at *Westminster* at the return, and he has appeared here.

The

The anſwer to this is, that it is not helped by appearance, becauſe the defendant has come in ſpecially, ſaving to himſelf all advantages whatſoever, and has challenged this defect by plea.

I may agree, without prejudice to this queſtion, that poſſibly if the defendant had come in, and not relied upon this exception, but pleaded over ſome matter of bar, that might have precluded him from taking this advantage afterwards. But when he expreſsly comes in for this ſpecial purpoſe, I apprehend he may inſiſt upon it.

I do admit, that any error in *meſne* proceſs is ſalved by the party's appearance, and he ſhall not afterwards take advantage of it; becauſe the only intent of *meſne* proceſs is to bring the defendant into court, and when he is come in, that is out of the caſe; for he might have come in upon the writ without it. But an original writ (as a *ſcire facias* to repeal letters patents was determined to be in the caſe of *The King* v. *Eyre*) is of another nature; for that is not only to bring in the party, but alſo to found the juriſdiction of the court in that particular cauſe, and to be the groundwork of all the proceedings of the court afterwards. And I know no caſe in the law, where it has been held, that an appearance has cured any error in the original writ.

In the caſe of *Wilſon* v. *Law*, *Trin.* 6 *W.* & *M. in B. R.* *Salk.* 59. In an appeal of death, the defendant prayed *oyer* of the original writ and return, and thereupon demurred in abatement, as he might do in appeal. Upon the argument an exception was taken to the ſheriff's return upon the original; and the anſwer was, that it was helped by the appearance. But the contrary was reſolved by the court; for that appearance only helps, when the party comes in and pleads to iſſue, not when he comes in and challenges the defect. In the caſe of *Widdrington* v. *Charlton*, *B. R. Trin.* 11 *Annae*, it was held, that error in *meſne* proceſs was aided by appearance. But in that caſe Mr. Juſ. *Eyre*, in giving his opinion, expreſsly allowed the authority of *Wilſon* v. *Law*, and diſtinguiſhed it, by obſerving that there the exception was to the return of the original writ, and therefore the appearance could not cure it: but here (ſaid he, and ſo was the opinion of the court) he ſhall anſwer to the original writ, becauſe that is good; and it was held that there was no difference between an appeal and any civil action, as to the effect of an appearance to cure errors; but that the effect of that was the ſame in all caſes. Lucas 86. Caſ. temp. Hardw. 39. 2 Barnard. B.R. 348. 3 Tr. Atk. 570. 2 Stra. 989.

As to the objection, that it is abſurd for a man to come, this court here ſitting, and object to the writ, that poſſibly he might have

have been hurt by not knowing certainly where to appear, or b[illegible] being made to appear in *Scotland*,

I take it, there is no abſurdity at all in that, for the law c[illegible] *England*, which delights in certainty, is more reaſonable tha[illegible] to put a man even to the hazard of being hurt by an illeg[illegible] writ, either in his liberty or his freehold, but he may come i[illegible] and take advantage of it, before he is actually affected by it.

Thus in caſes of *miſnomer*, where there is an original iſſue[illegible] againſt a man, or a bill of indictment exhibited againſt him, b[illegible] a wrong Chriſtian name: if proceedings were had upon th[illegible] writ or indictment, they could not finally affect him. If h[illegible] was to be arreſted by proceſs upon ſuch writ or indictment, h[illegible] might have an action of treſpaſs and falſe impriſonment againſ[illegible] the officer; nay, if he made oppoſition and killed him, it woul[illegible] be but manſlaughter, *Cro. Car.* 371. *pl.* 6. But notwithſtand-ing all this, to prevent any poſſible danger to this man's libert[illegible] or property, though he could not effectually be hurt by it, th[illegible] law allows him time to come in and plead that *miſnomer* to th[illegible] writ or bill, and it ſhall abate for that reaſon; and the defend-ant not be put to anſwer, though he is in court.

And this he may do voluntarily, without ſhewing that he wa[illegible] brought in either by ſummons or compulſion; only ſaying, that the defendant (ſuppoſe *J. S.*) *verſus quem* the plaintiff *tulit brev[illegible] ſuum*, or *exhibuit billam ſuam*, *per nomen Samuelis*, is named *John* and not *Samuel*; and the writ ſhall abate.

I mention this to ſhew, how carefully the law has guarded the ſubject from receiving injury by erroneous proceedings; that barely upon the poſſibility of his being affected, he may come and take advantage of it, and avoid thoſe proceedings, without ſtaying till he is actually hurt by them.

And if he may do this in mere perſonal actions, much more may he do it in caſes where his freehold comes in queſtion. And that it does in this caſe; for this is a *ſcire facias* to repeal a grant of an office for life, and conſequently to ouſt the party o[illegible] that freehold, and for that reaſon has ſomething in it of the na-ture of a real action. And it would be needleſs to mention what gteat advantages the law allows to defendants in real actions in point of proceſs and pleading, in order to fence and ſecure the freehold of the ſubject.

Another objection was, that to determine this writ to be wrong, would be to overthrow a multitude of judgments ſince the union.

I

If this exception depends upon the fame reafon with that which was taken and allowed in *Perfehoufe's* cafe (as I have endeavoured to fhew it does) and is only a confequence of the rule which was then laid down; then if the precedents fhould be fhaken, it will be owing to that judgment, and not to the judgment which we contend for in this cafe.

But I do not remember ever to have heard that argument allowed, where the former precedents are both ways, as they are in this cafe; and befides, where there was a judicial precedent in favour of the exception. For more mifchief has always been apprehended from fhaking one judicial precedent, than a hundred precedents *fub filentio.*

I take it, that this apprehenfion of danger is but a vain terror, and that there can be no fuch inconvenience; for that where there are judgments, this exception will be out of the cafe, and the defect cured. Where the defendant has come in, and not challenged the exception, but pleaded over fome matter of bar; that is a waiver of it, and he cannot take advantage of it afterwards by writ of error; according to the rule which was laid down by Mr. Juftice *G. Eyre* in the cafe of *Wilfon* v. *Law*, that an appearance will help, where the defendant comes in and pleads to iffue, and does not challenge the defect of the writ.

There are many cafes, where want of challenge of the party will cure a defect even appearing upon the face of the writ. As in debt upon fimple contract againft an executor, which does not lie; yet if he pleads to it, and a verdict be againft him, he fhall not take advantage of it in arreft of judgment, or by writ of error. *Yelv.* 56. 1 *Lev.* 201, 261. In the cafe of variance from the *Regifter*, that may be pleaded in abatement, but if the defendant waives that opportunity, he cannot take advantage of it afterwards. And fo it was held *Trin.* 12 *Ann. B. R.* in the cafe of *Skinner* v. *Newton.*

Beetle replied: The jurifdiction and procefs of this court neither is, nor was defigned to be altered by the union; for there is an exprefs refervation. Though if there had not, no body can think it would have made any alteration: However, it was thought proper to declare fo, *in majorem cautelam*, that as to all matters concerning *England* the great feal fhould be ufed as it was before the union.

Ubicunque

Ubicunque fuerit generally, differs from *ubicunque fuerit in Magna Britannia*: The latter can by no intendment be right, but the former may, according to the known rule of construction, *verba generalia generaliter sunt intelligenda*.

Precedents, though they pass *sub silentio*, are surely evidence of the forms of the court. And thus far they are authorities, that they shew it was not thought necessary to alter them, when in 10 *Edw.* 1. *Wales* was united to, and became parcel of the dominions of *England*; nor when *Calais* was so likewise. Two or three precedents make not the law against a multitude to the contrary. 39 *H.* 6..30. 4 *Ed.* 3. 43. *a. Long Qu. E.* 4. 110. It was upon the strength of the precedents, that the case of *Bewdly* was resolved, and they were there set up in opposition to, and prevailed against the expreſs words of the act of Parliament.

But if we should admit their precedents, yet they must admit ours too; and then they being both ways, either form is good: though by the way I must observe, that the forms of the *Register* cannot be altered, but by act of Parliament.

Sir *Joseph Jekyll*, Master of the Rolls. That is certainly so, and therefore if this form be warranted by the *Register* and the precedents, I think nothing can be stronger. This court is still the court of Chancery of *England*; it is the Great Seal's being the Great Seal of *Great Britain*, which occasions the bills to be directed to the Chancellor of *Great Britain*.

I think there would have been no clashing of jurisdictions, if the special reservation had been omitted. The 19th article is a covenant, that the jurisdiction of *Scotland* shall remain notwithstanding the union; and as it preserves the former jurisdiction to *Scotland*, so it excludes the *English* jurisdiction from extending itself thither.

Parker, Lord Chancellor. The words *ubicunque fuerit* were as large as possible, and when *Calais* was part of *England* might extend to that, though the subject would not be bound to appear there. But when you go to explain it, it must be right; therefore *in Magna Britannia* is certainly wrong. All the powers of this court flow from the Great Seal, which though it is now made the Great Seal of *Great Britain*, yet the act has not made the Chancery so. The powers of the Chancery, as a court, are in private property; and the articles excluding that, the Chancery as a court of private property cannot

cannot be there. All contempts of this court will be discharged, if this form should not be established. In the case of *Bewdly* I thought the objection was very strong, but it was got over for the necessity of the thing, and not barely for the sake of uniformity: And this case and that are both in the same reason. The defendants must answer over. *Respondes ouster agard.*

Dominus Rex *versus* Decan' et Capitul' Norwici.

MANDAMUS to admit Dr. *Sherlock* to a prebend of the cathedral church of *Norwich*. And the writ suggests, that Queen *Anne*, by letters patent, 26 *April*, 13th of her reign, incorporated Dr. *Sherlock*, then master of *Catherine-hall* in *Cambridge*, and the fellows and scholars for ever; and grants that the then master (naming him) should succeed to the next vacancy of a prebend in *Norwich*, and his successors, masters of *Catherine-hall* after him, requiring the dean and chapter to assign him *stallam in choro et vocem in capitulo prout mos est*. Which letters patent were confirmed by the statute 12 *Ann*. against mortuaries. And one of the prebendaries being now dead, this is the first vacancy, to which the dean and chapter are required to admit Dr. *Sherlock*. They return, that King *Edward* the sixth, by letters patent, 7 *November*, first year of his reign, erected the deanery and chapter of *Norwich* into a corporation, and endowed the church, and gave them perpetual succession. That neither he, nor Queen *Mary* or Queen *Elizabeth*, ever made any statutes for the government of the corporation. But King *James*, by a body of statutes ordained, that as often as there should be any vacancy, the dean and chapter should admit such person as the King should nominate under the great seal. And further (which is the clause upon which the question arises) that none should be admitted to be dean or prebendary, who before was prebendary of any other cathedral church. And that these are the statutes which they have sworn to observe. And for that Dr. *Sherlock* is dean of *Chichester*, and a prebendary of *St. Paul's*, they refuse to admit him; *et ob nullam aliam causam*.

Mandamus to admit a prebendary to his stall and voice.
3 Bac. Abr. 532.
Andr. 21.
Barnard. K. B. 40. S. P.

12 Ann. st. 2. c. 6.

Reeve argued that the return was insufficient, and for a peremptory *mandamus*. The letters patent being confirmed by act of parliament, we are now as it were upon the construction of a statute, and as if every part of those letters patent was incorporated into the body of the act. And as such it is of force enough to repeal and annul all former ordinances or usages contrary to or inconsistent with it. So that whatever questions might arise upon the letters patent, if they stood barely upon their own strength, and how far they would prevail to set aside

and

and controul the local ſtatutes of King *James*, will be intirely out of the caſe.

It will not be denied, but here is an expreſs intention to unite the maſterſhip of *Catharine-hall* and this prebend in one and the ſame perſon for ever, and that Dr. *Sherlock* is to be the firſt perſon in whom this proviſion is to take effect. But what they inſiſt upon is, that he is a perſon incapable to enjoy this prebend under the local ſtatutes. I admit he is, if thoſe ſtatutes are in force, which I have ſhewn they are not. But then they ſay, our letters patent have in this particular affirmed the former law, for they only require the admiſſion to be *prout mos eſt*, which *mos* is *mos eccleſiae* the conſtitution of our church, and that conſtitution obliges us to refuſe any perſon, who is that time prebendary of any other church. So that *prout mos eſt* is as much as to ſay, that the maſter of *Catherine-hall* ſhall be admitted, if he be capable according to the conſtitution.

But this is going too far, if we conſider where thoſe words come in. The letters patent ſay, that Dr. *Sherlock* and his ſucceſſors, maſters of *Catherine-hall*, ſhall be *habiles et in lege capaces*, to hold and enjoy this prebend, and upon every vacancy *mandantes et requirentes* the dean and chapter to admit them accordingly, *prout mos eſt*, in the uſual form.

The oath in which the dean and chapter are bound to obſerve the former ſtatutes, is of no force, now thoſe ſtatutes are repealed.

It is conſiderable, that as Dr. *Sherlock* is the firſt named, if he ſhould be held incapable, whether this proviſion can ever take effect, and whether his ſucceſſors will not be in the caſe of remainder-men without any particular eſtate, No body can take if the doctor cannot; and muſt this prebend be in perpetual abeyance, which may happen to be the caſe, for his ſucceſſors may be dignified as well as himſelf. And in this caſe it is not denied, but that he is maſter of *Catherine-hall*, and as ſuch he is intitled to this prebend.

Reynolds Serjeant *contra*. We do not in this caſe debate the validity of the grant, but only offer to excuſe our non-admittance. Nor do we rely upon the words *prout mos eſt*, it is but *expreſſio eorum quae tacite inſunt*, and when the office is given to Dr. *Sherlock*, he will be intitled to be admitted without that clauſe.

This

This is a common appropriation, and by it all the local statutes exprefsly contradictory to it will be repealed, as if they had difabled every mafter of a college, and then the other had come and faid, the mafter of *Catharine-hall* fhall be prebendary. But what I contend for is, that the fubfequent provifion meddles not with any collateral incapacities, fuch as Dr. *Sherlock* lies under by being prebendary of another church. Suppofe he fhould refufe to fubfcribe, as the 14 *Car.* 2. *c.* 14. requires; it is true he would have a right to the preferment of mafter of *Catharine-hall*, but before he gets poffeffion of it, he muft remove his incapacity. And here I admit, if he refigns his other prebend, he will be intitled to be admitted. So that this is only a perfonal difability, arifing from his own act, from which he may free himfelf whenever he pleafes. Suppofe he had been able at the time of the ftatute, fo as then the local ftatutes would not be affected; fhall his fubfequent acceptance of a prebend amount immediately to a repeal of the former provifion?

As to the office's being in abeyance, there is no need for that. Dr. *Sherlock* is intitled whenever he renders himfelf capable, and till then the 28 *H.* 8. *c.* 11. has given the profits of vacant benefices to the next incumbent.

Reeve replied. This cafe can never be brought within the rule of legal difabilities by act of Parliament, where a man is obliged to do any act, to give the publick fatisfaction of his fufficiency for the office he is to be admitted to. *Curia advifare vult.* And afterwards

Pratt C. J. delivered the refolution of the court. We are all of opinion, that the return is infufficient, and that there ought to be a peremptory *mandamus*. Upon the firft letters patent, *Jac.* 1. the power of the King as founder is reftrained, and the dean and chapter, as it ftood upon thofe ftatutes, might well refufe fuch a perfon as Dr. *Sherlock*. And fo they might upon the letters patent of Queen *Anne*, for fhe having but a bare right of nomination, could never unite the canonry itfelf to the mafterfhip of *Catharine-hall*. They may perhaps have their effect as a perpetual nomination; but there is no occafion to determine that point, fince here is an act of Parliament, which has confirmed thefe letters patent, and by which we are of opinion, the canonry itfelf is well united to the mafterfhip of *Catharine-hall*. And it not being denied, but Dr. *Sherlock* is mafter of it, he is as fuch intitled to a peremptory *mandamus*.

Pitton *versus* Walter. At Surrey assizes.

Postea, where evidence.

See Barnard. K. B. 243.

PER *Pratt* C. J. The bare producing the *postea* is no evidence of the verdict, without shewing a copy of the final judgment. Because it may happen the judgment was arrested, or a new trial granted. But it is good evidence, that a trial was had between the same parties, so as to introduce an account of what a witness swore at that trial, who is since dead.

Heralds books evidence of a pedigree.

Salk. 281.

The question being, whether the lessor of the plaintiff was heir at law to him that last died seised; to prove the pedigree, the Chief Justice admitted a visitation in 1623, made by the heralds, entered in their books, and kept in their office, to be read in evidence: He also admitted the minute book of a former visitation, signed by the heads of the several families, which was found in the library of my Lord *Oxford*.

Easter

Eafter Term

5 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Juftice.*

Sir Littleton Powys, *Knt.*
Sir Robert Eyre, *Knt.*
Sir John Fortefcue Aland, *Knt.*
} *Juftices.*

Nicholas Lechmere, *Efquire, Attorney General.*

Sir William Thompfon, *Knt. Solicitor General.*

Between the Parifhes of Burclear *and* Eaftwoodhay.

ON a fpecial order of feffions the cafe was ftated for the opinion of the court. That *Abraham Hatchett*, being legally fettled in the parifh of *Burclear*, about 18 years fince married and had four daughters. About eight years fince he came with his wife and children into *Eaftwoodhay* as a certificate-man. Whilft they were there, a copyhold of 20 *l. per annum* * *defcended* to his wife, which they enjoyed for five years till her death, and then according to the cuftom of the manor it defcended to the eldeft daughter. About half a year ago the man afked relief in *Eaftwoodhay*, and thereupon the feffions fend him back to *Burclear*. Before they took up the cafe upon the fpecial ftate of it, an objection was made to the order of the two juftices, " that they only adjudge him *likely* to become " chargeable;" whereas a certificate-man is not removable, till he becomes actually fo. And though the order of feffions ftates, That he afked relief of the parifh; yet one order fhall

Defcent of a copyhold to a certificate-man gives him a fettlement.
10 Mod. 430. Caf. of Set. and Rem. 90. pl. 121.

* It was not a defcent, but a *furrender* by the wife's father in his life-time.

 not

not be made good by another, no more than it can by matter alleged in the return. To which it was anſwered, that if the order of two juſtices is to ſtand by itſelf, then it will be well enough; for it is a general order of removal, wherein no notice is taken of his being a certificate-man, and therefore likely is ſufficient. Beſides, that order is intirely out of the caſe, for the ſpecial matter being referred to the court, they are to judge upon that only. *Quod fuit conceſſum per curiam.* Then it was moved to quaſh the ſpecial order, becauſe though the man came into *Eaſtwoodbay* with a certificate, yet the enjoyment of the copyhold for five years, during which time he was not removable, had gained him a ſettlement there. On the other ſide
9 & 10 W. 3. c. 11. it was ſaid, That the 9 & 10 *W.* 3. *c.* 11. having provided, "that a certificate-man ſhall not gain a ſettlement, unleſs he takes 10 *l. per annum*, or ſerves a pariſh office"; and that being an explanatory act, which is not to be explained; therefore this man not coming within either of thoſe caſes, was, notwithſtanding the deſcent of the copyhold to his wife, removable upon his becoming a charge to the pariſh. *Et per curiam:* This is not an explanatory, but a new law, and muſt therefore receive a liberal conſtruction. The exceptions in the ſtatute prove this caſe, being a caſe more reaſonable than either that are therein mentioned. If a certificate-man by taking 10 *l. per annum* gains a ſettlement, *a fortiori* ſhall he that has an eſtate of his own, eſpecially in this caſe, where he does not come to it by act
Salk. 524. of his own, (which might favour of fraud) but it is caſt upon him by the act and operation of law. If he that ſerves a pariſh office gains a ſettlement upon account of his preſumed ability, with greater reaſon ſhall he that has ability of his own viſible to all the world. It has been already adjudged, that any other perſon by the deſcent or purchaſe of a freehold or copyhold, or by becoming intitled to a leaſe for years, gains a ſettlement; and it cannot be ſuppoſed the Parliament intended, to put a certificate-man in a worſe condition. The value of the copyhold is not material, for it is its being his own makes him not removable. A man muſt take a tenement of 10 *l. per annum*, to gain a ſettlement; but yet he may come to ſettle upon a tenement of his own, though of ever ſo ſmall a value. This man therefore being for five years irremovable from *Eaſtwoodbay*, has gained a good ſettlement there, and the order to remove him from thence muſt be quaſhed.

Atkins

Atkin *versus* Barwick.

A delivery to *A.* to the use of *B.* upon a precedent consideration is not countermandable, but vests the absolute property in *B.* by the agreement. Fortesc. Rep. 353. 10 Mod. 432.

THE plaintiff, as assignee of the effects of *Cripps* and *Quarme*, bankrupts, brings trover against the defendants for several parcels of silks. And upon the trial a case was made for the opinion of the court.

That the defendants were mercers and partners in *London*, and usually dealt with *Cripps* and *Quarme*, who were also partners, living at *Penryn* in *Cornwal*. And on 7 *April*, 1715, the defendants by their order sent the goods in the declaration, and gave them credit in their books. They being at the same time indebted to them for other goods. 18th of *May* following *Cripps* and *Quarme*, without the knowledge of the defendants, sent divers silks (the same sent down in *April*) to Mr. *Penhallow* at *Penryn* for the use of the defendants. *June* the 4th *Cripps* and *Quarme* became bankrupts. *June* the 6th they wrote a letter to the defendants, signifying their affairs were in a declining condition; and thinking it not reasonable, the last parcel of goods should go to satisfy their other creditors; therefore they had not entered them in their books, but left them with *Penhallow*, who had orders to deliver them to the defendants. *June* the 9th a commission of bankruptcy issued, and the effects were assigned to the plaintiff. *June* the 13th the defendants received the letter, which was the first notice they had of the delivery to *Penhallow*, and as soon as possible they signified their consent to take the goods again.

Reeve pro querente. The bankrupts had undoubtedly a good property in the goods by the sale made the 7th of *April*. That is a point I need not labour. But the question now to be considered is, whether any thing appears, to divest that property, before the act of bankruptcy. I shall maintain the negative of this question. The goods it is true were delivered for the use of the defendants, but that delivery was without their knowledge. They were not obliged to accept them, and therefore before acceptance the property could not be altered, and the bankrupts might have countermanded that delivery. If, instead of sending them to *Penhallow*, they had kept them in their own hands, till an answer to the letter; would that have altered the property? Certainly it would not. This letter can amount to no more than a proposal, and therefore the subsequent consent (if it has any retrospect) can only have relation to the time of the proposal, which was two days after the act of bankruptcy. Though the delivery is stated to be to the use of the defendants, yet it does not appear to be in satisfaction of the precedent debt; so there is no

confideration, and then the delivery is fraudulent as to creditors. 1 *Mod.* 76.

Darnall Serjeant *contra.* By the delivery to *Penhallow* the property was altered before acceptance, and the bankrupt could not countermand it; for there was a good confideration, *viz.* in fatisfaction of the debt; and this is explained by not entering it in their books, and their unwillingnefs that the other creditors fhould come into an average for thefe goods. This does not take effect as a gift, but as a fatisfaction, and therefore not countermandable. *Dy.* 49. *a.* 2 *Roll. Rep.* 39. 2 *Leon.* 30. And fince it cannot be countermanded, the perfon to whofe ufe they were delivered, has an abfolute property in them, till difagreement. 1 *Roll. Abr.* 32. *pl:* 13. *Sty.* 296. *Yelv.* 164. *Cro. Jac.* 667. Here was no difagreement, but as fpeedy a confent as poffible.

Reeve. An accord executory is no fatisfaction, before it is executed. It is admitted that a delivery without confideration may be countermanded, and I infift this is fuch; for the precedent debt is not merged, becaufe the party could not plead this re-delivery in bar of any action for the value of the goods, unlefs they actually were returned to the perfon who fold them, or he fignified his confent, which was not done before the act of bankruptcy committed.

C. J. The queftion is, whether by the delivery to *Penhallow*, without more, the property was altered; for if that delivery was countermandable, then the act of bankruptcy intervening before any affent of the defendants, will prevent the property from vefting in them. I think, upon the circumftances, that there appears a fufficient confideration to toll a fubfequent power of countermanding, and that this delivery was in fatisfaction of the debt. It is true the bare delivery will not extinguifh it, becaufe he had a power to diffent; but yet according to *Butler* and *Baker*'s cafe in the 3d *Report*, the abfolute property paffes, fubject to a difagreement by one of the parties: The contract does not ftand open till agreement, but is compleat, unlefs there be an actual difagreement. The confequence of all this is, that the delivery to *Penhallow* to the ufe of the defendants, being before the act of bankruptcy, and founded upon a good confideration, transfers the abfolute property to them, it being ftated that they never difagreed. *Powys* J. *accord'.*

2 Ven. 198. Show. Ca. Parl. 150. Salk. 618. Thompfon v. Leach.

Eyre J. All thefe cafes go upon the diftinction, where the delivery is with and without confideration. *Dy.* 49. If with confideration, and the delivery is of money, debt lies. *Yelv.* 23, 24. 2 *Cro.* 687. *Raft.* 159. If of goods, trover. 1 *Bulft.* 68.

1 *Bulst.* 68. The precedent debt is a sufficient consideration, and it vests before notice; for it being to his benefit, a disagreement shall not be presumed.

Fortescue J. Property by our law may be divested, without an actual delivery; as a horse sold in a stable. But it is otherwise by the civil law. A general bailment alters no property, but this is not such. It cannot be taken for a resale, for defect of contract; but it is properly a payment in satisfaction. It is most reasonable to apply it to discharge the debt, and not as a gift; for a man is just before he is kind: And since he paid it in satisfaction, we will intend an acceptance, till the contrary appears. *Judicium pro defendentibus.*

Bradshaw *versus* Mottram.

THE plaintiff brought a *qui tam* upon the stamp act against the defendant, for marrying without licence; and had him in execution, where he had lain some time. And now *Yorke* cited the 18 *Eliz. c.* 5. §. 3. and produced an affidavit of the poverty of the defendant, and had the leave of the court, that the plaintiff might compound with the defendant. Leave to prosecutor to compound with defendant.

Dominus Rex *versus* Saunders.

YORKE moved for leave for the coroner to take up the body, and take a new inquisition, according to 2 *Sid.* 101. *Salk.* 377. which was granted; and it was said, the coroner could not do it without leave of the court. Leave to take new inquisition *super visum corporis.*

Hudson et ux' *versus* Ash.

At Nisi prius *in* Middlesex, coram Pratt, *C. J. de B. R.*

THE plaintiff's wife was taken up by warrant of a justice of peace, for assaulting the overseer of the parish, and assisting to the escape of a woman delivered of a bastard child. When she came before the justice, she could not find bail; but at her request he gave leave for her to lie that night at the constable's house, in order to get bail against the morning. Then one on her behalf demanded a copy of the commitment, which not being delivered, an action was brought upon the *habeas corpus* act. *Et per Pratt*, C. J. The questions are two, whether Constable, within *habeas corpus* act.

the defendant be an officer, and whether the plaintiff's wife was detained by virtue of any warrant within the meaning of the statute. As to the defendant there is no doubt but a constable is within the act, but I do not think this action well brought. For the woman was not in his custody by virtue of any warrant; what warrant there was, was only to bring her before the justice, and that was fully executed by so doing; and the time she staid at the constable's after that, was not by virtue of any warrant or commitment, but at her own consent and desire, to remain under a voluntary custody: Neither is this a case within the mischief of the statute which was indefinite commitments. The plaintiff was called. Then the defendant moved for treble costs, being a constable. But the Chief Justice would not certify, because this custody was not in execution of his office.

Tremain's case. In Canc'.

Infant. cited in 3 Tr. Atk. Rep. 721. pl. 271.

BEING an infant, he went to *Oxford*, contrary to the orders of his guardian, who would have him go to *Cambridge*. And the court sent a messenger, to carry him from *Oxford* to *Cambridge*. And upon his returning to *Oxford* there went another, *tam* to carry him to *Cambridge*, *quam* to keep him there.

Turner *versus* Trisby. At Guildhall.

What necessaries to charge infant.

PER *Pratt*, C. J. Necessaries for an infant's wife are necessaries for him; but if provided in order for the marriage, he is not chargeable, though she uses them.

The East-India Company *versus* Atkins. In Canc'.

Where a man submits to be examined as to matters which will be penal upon him, equity will not interpose. S. C. Com. Rep. 347.

MR. *Vernon pro defendente*, in maintenance of the plea. This bill is brought by the *East-India* company, for a discovery of a private trade, suggested to have been carried on by the defendant and the other supercargoes of the *Stringer* galley, which was sent by the company in the year 1715, upon a voyage from hence to *Canton* in *China*, and thence to return to *England*.

They first offer to waive the penalties and forfeitures that he might incur by such discovery; and then they strengthen themselves by a covenant entered into by the defendant, by which he obliges himself to answer to any bill to be brought against him for any discovery in any court of equity, and not to plead the acts of Parliament, which inflict those penalties and forfeitures.

As

As to their waiving all penalties and forfeitures which might be incurred by the defendant by such discovery, we apprehend it is not in the power of the plaintiffs to indemnify us against them. Therefore I must take notice what discovery they pray.

They charge that the defendant and the other supercargoes agreed to receive on board several goods from the *Thurston* galley: That for that purpose the *Stringer* and the *Thurston* sailed together to the *Downs*, where the *Stringer* took on board such goods as had been agreed upon. That having so done, they proceeded to *Canton*, where they in a private manner disposed of those goods, and with the produce of them bought another cargo of goods, which they put on board the *Stringer:* That they appointed the *Thurston* pink to meet them in their return; but failing in that design they touched at *Lisbon*, and there sent away several parcels of these private goods: And other part was put on board the *Success*. And after all this they met with the *Lemmon* at sea, on board which they put the remainder of the goods, and they were sent to *Holland*.

We apprehend, if we are bound to answer this charge, we shall be subject to all the penalties appointed by the act 9 *W.* 3. which are loss of the ship, goods and double value; and also of 6 *Ann.* against breaking bulk. By the act 9 *W.* 3. three fourths of the forfeitures are given to the company, and so far as that goes perhaps they may waive, But the other fourth and the ship and the double value they have no pretence of a right to, or power to waive, that being given to the informer. Therefore, to give some colour to this offer, there is an allegation in the bill, that the company is become the informer, and so they may waive the whole penalty.

9 W. 3. c. 44.
6 Ann c. 3.

To this it was objected the last time, that although it is alleged that they have informed, yet it is not set out where or when they informed, or for what goods. If they would have enabled themselves as informers, they ought to have shewn the information, and that it related to these goods, and these facts charged in the bill. The plaintiffs were so conscious of that, that when a person on behalf of the defendant went, in order to have a sight of the information, and to see whether the company had a power to make such an offer, he was denied a sight of it. Therefore we think, that ought to be laid out of the case, and by consequence their waiving the forfeiture will go for nothing.

As to the penalties in 6 *Ann.* against breaking bulk, by which it is enacted, that all goods to be laden in the *East Indies* shall be brought to some port of *Great Britain*, and there unladen, and

and ſold by the company at a publick ſale by inch of candle: The penalty is forfeiture of the value of the goods, one moiety to the crown, the other to the informer or ſeizor. And they do not pretend a title to that forfeiture.

They endeavoured to evade that act, by ſaying it reſpected the company only, but not thoſe that traded privately. But ſurely that cannot be the intent of the act, that when thoſe who are licenced to trade to the *Eaſt Indies* are liable to theſe penalties, he that trades in a clandeſtine manner ſhall be in a better caſe. But to put that out of diſpute, upon reading the words 6 *Ann.* it is enacted, "That all goods which ſhall be "laden in the *Eaſt Indies* upon any ſhip or veſſel belonging to "any of her majeſty's ſubjects with intent to be tranſported, "ſhall be brought to ſome port of *Great Britain*, and there be "unloaden; upon pain of forfeiture of all ſuch goods, one "moiety to the queen, and the other to the informer." So that if the defendant ſhould be forced to make this diſcovery, he muſt be liable to the forfeitures in that act, and the waiver of the plaintiffs will not ſave him harmleſs.

Taking that to be ſo, we apprehend we are in the common caſe, that no court of equity will compel a defendant, to ſet forth any thing that will ſubject him to penalties. But on the contrary a court of equity relieves againſt forfeitures. The plaintiffs being aware of this, have inſiſted upon a covenant, they have got the defendant into, that he would at his return to *England*, if required, anſwer upon oath to ſuch bill as ſhould be brought againſt him for a diſcovery, and not demur or plead in bar: And the company agree to waive the forfeitures, and accept of their damages, which amount to 90 *l. per cent.* and are as much as the forfeitures.

This is the firſt of the kind that has come into a court of equity, and if it ſhould be admitted, may be of dangerous conſequence. I would obſerve, that we are not plaintiffs to be relieved againſt this covenant, though the manner of obtaining it is extraordinary. After theſe gentlemen had been taken into the company's ſervice, and had prepared every thing for their voyage; then they muſt execute this covenant, or elſe be diſcharged. Theſe are hard terms to be put upon any man, but it is what the company has practiſed. Then they are alſo to contract, upon what terms they are to receive their wages; and though they go upon a trading voyage from port to port, and deliver their loading; yet there is a covenant, that if the ſhip miſcarries in her return, they are to loſe their wages. This covenant, as often as it has been brought in queſtion, has been ſet aſide.

The

The next thing I would observe is, the consideration given to these people for entering into this covenant, which is an undertaking on the company's part, that they shall not be subject to any forfeitures or penalties. That seems to be the consideration. But that is an undertaking, which the company cannot pretend to make good. And then the covenant is without consideration.

Besides if the plaintiffs are to have any benefit of this covenant in a court of equity, it must be by praying a specifick performance of it. And there is always a difference taken, between a circumstance of fraud in order to set aside a covenant, and where there is room to decree a specifick performance of it.

It is objected that a man may waive any benefit the law gives him, and enter into an agreement for that purpose. To this I answer, Those agreements have always been ill looked upon in a court of equity. Where a man gives a mortgage on his estate, with a covenant not to bring a bill to redeem; it cannot be pretended, but that, notwithstanding such covenant, he may bring his bill, and the court will decree a redemption. Nay though he confirms it with an oath, for so far Mr. *Stiftead* went as to take an oath from the mortgagor, and yet in that case the court decreed a redemption. Where a man borrows money upon a mortgage, and covenants that if he doth not pay the interest yearly, such interest shall carry interest; this seems to be a reasonable compensation to the party, for being disappointed of the receipt of his interest. And yet a court of equity will relieve against such a covenant. Though the party that enters into those covenants, may be said as much to forfeit or waive the benefit of a court of equity, as we have done in this case.

We apprehend the covenant to be of an extraordinary nature. It is, that a man shall not make part of his defence. That when he comes before the court, he shall not set forth the truth of his case. Indeed in a covenant to suffer a common recovery, there is an agreement what defence the parties shall make; but was it ever known in a court of equity, that a covenant to strip a man of his defence was allowed? If you can abridge a man of one part of his defence, why not of the whole? If this is good, it may be carried further, and you may have a covenant, that if a bill be brought, the defendant shall appear and make default, and the bill be taken *pro confesso*. And that will be a new step, and it will concern a court of equity to withstand all such attempts as this.

The covenant is, that he fhall not plead the penalties and forfeitures; but what if he does plead? Is the court to pafs over that part, where he has pleaded them? Will the court upon an allegation of fuch a covenant pafs over the merits of a caufe? No truly, they will rather go into them, in abhorrence of fuch a practice.

We cannot apprehend of what weight this covenant is in a court of equity. We do not know what a court of equity has to do with a covenant, unlefs it be executory; there a man may come to have a fpecifick performance of it: But can they pray a fpecifick performance of this covenant? He has covenanted, he will not plead, and yet he has pleaded. Is there any thing executory in this? They may take what advantage they can of this covenant at law, but a court of equity will add no weight to it, efpecially when it is to fubject a man to a penalty, contrary to the bufinefs and intent of a court of equity, which is to relieve againft penalties and forfeitures.

The rule in equity, that no defendant fhall be compelled to fubject himfelf to penalties and forfeitures, is founded on natural right and juftice. It is a rule that has been obferved inviolably without exception till this attempt. Therefore as we cannot be acquitted by the company from thefe forfeitures, it would be a monftrous thing for a court of equity to make us liable to them; and the rather in this cafe, becaufe it is making a ftrain, upon an allegation of the company, and barely upon an apprehenfion that they have been injured by the defendants. Whereas it appears by the pleadings, that they never had a better voyage or more profitable return, for they made 200 *l.* *per cent.* profit.

They furmife, that the goods put on board the *Stringer* galley by the defendants were of great value, and that their tonnage would amount to a great fum; whereas it appeared upon the furvey, when the fhip arrived in the river, that fhe was full loaden with the company's goods. So that their whole complaint feems to be conjectural and groundlefs, and has no oath to fupport it: Or if there was any real ground for it, the plaintiffs may have their remedy at law. We do not come into this court to be relieved againft this covenant; but for the plaintiffs to take from us our lawful defence, and thereby to fubject us to forfeitures and penalties, there is no ground for it; and therefore we hope our plea fhall be allowed.

Sir *Thomas Powys contra.* In order to remove the prejudice which the defendants have endeavoured to bring the company under,

under, by repreſenting them as impoſing or requiring a very extraordinary covenant from them, I would obſerve, that the act 9 *W*. 3. has eſtabliſhed an oath to be taken by members of the company, that they will not ſend to the *Eaſt-Indies* any goods for their private account, contrary to that act. So that we are upon an act of Parliament, and the covenants the company takes from their ſupercargoes, is in purſuance and execution of that act; and there is nothing charged in this bill but what is forbidden by that act; for we aſk them, Did not you carry more goods than the company allowed? Did you not when you went out make an agreement with the *Thurſton* galley, that ſhe ſhould at high ſea lay on board ſuch and ſuch goods? And ſo go on with the ſeveral parts of the fraud.

Now as to the outward voyage, the act of Parliament inflicts no penalty, and only forbids all other perſons, except ſuch as by that act may trade, their ſervants or agents. The defendants are the agents of thoſe perſons who may trade thither, and not within the deſcription of thoſe who are by that act ſubjected to penalties for exporting goods to the *Eaſt-Indies*. Therefore, as to the outward voyage, they are not within any of the penalties of that act.

But ſuppoſe theſe men ſhould not be taken (with reſpect to theſe tranſactions) to be agents to the company, but to be perſons within the act; yet by this act three fourths of the forfeitures are given to the company, and the other fourth to the informer; and the company having become informers are intitled to it: And it is ſo charged in the bill, that no information having been brought by any other perſon for the forfeitures, the company have preferred one in the Exchequer.

If that be ſo, we have three fourths by the act, and the other fourth as informers, and ſo may waive all the forfeitures. And then we are in the common caſe of a man that ſues for tithes, he may waive the forfeiture, and bring a bill for a diſcovery. So a man may waive the penalties in the ſtatute and have a diſcovery what timber has been cut. We therefore apprehend, that as to the outward bound voyage we have a right to call them to an account; and if ſo, they muſt anſwer a great part of our caſe, which is all the tranſaction relating to this fraud, from the time of their entering into our ſervice, till their return. And yet the plea is general, and covers the whole, as well the outward as the home bound voyage.

The home voyage falls under another conſideration. For the ſtatute 6 *Annae* taking notice, that there had been great frauds in breaking bulk, it provides that thoſe who offend in that manner

manner shall forfeit the ship and goods; one moiety to the informer, and the other moiety to the crown. And that stand upon the point of the covenant that has been spoken to, whether a man may not agree, that he will not commit a fraud.

As to the case of a mortgage, it is in its own nature redeemable, and a covenant contrary to the nature of it shall not be allowed. But may not a man covenant that he will not disturb a purchaser? This covenant is only to prevent a fraud, and detect it if committed.

And this agreement is upon a good consideration, for it is the foundation upon which the defendant is let into so considerable a profit. The consideration of the covenant is, that the company allows them those profits mentioned in the bill so that it is both a lawful covenant, and for a valuable consideration.

Then it is a covenant that goes along with a trust, which no man would put in another, without a power to come to the knowledge how it is discharged; for these dealings lie in the knowledge of the defendants only, and cannot come to the knowledge of the company, without a discovery from the defendants. It is a trust to be executed on board a ship, and at sea; and therefore necessary to be guarded by some reasonable provision. It is not like a covenant to have interest upon interest, for a man has a recompence by simple interest. And interest upon interest is what the law will not allow of. But this covenant does not hinder any man of his right, but only prevents a fraud.

It is said a man has a right to plead, but may not a man renounce that right? He may in the case of tithes, and may not a man renounce part of his defence? May not I take a covenant, that a man shall give a judgment by default, and release of errors? And may I not come into a court of equity and compel a performance of that covenant? In the case of a covenant to suffer a common recovery, will not the court decree a performance?

It is true, that in ordinary cases a man has liberty to plead, where he may be subjected to penalties. But then a man may waive it. And it is agreeable to the known maxims, *volenti non fit injuria*, and *consensus tollit errorem*. If a man will waive any particular manner of defending himself, why may he not?

The case is no more than this; I have made an agreement whereby I am to be honest, but I will also have an opportunity to get more than I ought. I have made a contract that is

is not convenient for me to perform, it is fit for me to have the profit allowed me by the company, but for me to perform my part of the covenant is no ways convenient. That is to *say*, I have played the knave, and therefore it is not convenient for me to perform this covenant, by discovering in what manner.

The question therefore is, which of the parties shall suffer. Shall the company suffer, who have performed their covenant? Shall they be stript, and the defendant go off with the profit? or shall the defendant suffer (if he calls it so) for his own misbehaviour, if he has misbehaved himself? I apprehend, that to take from us the means of coming at a satisfaction, is to take away the satisfaction itself. He that disseises me of the water that should come to my mill, disseises me of my mill.

The covenant is, that they shall not trade, and if they do, the company shall have so much *per* ton, and so much damages, which comes to 90*l. per cent.* and this is said to be an extravagant recompence. Now they say, they have made 200*l. per cent.* profit for the company; and if so, no doubt but they have made as good profit for themselves; and all the company is to have is but 90*l. per cent.* and they carry off the rest.

They say we may take our remedy at law. But the very covenant is, that we shall have a satisfaction in this court. If we were to go to law, how could we recover there? How could we prove what goods they carried out? Let us but have a discovery of that here, and the measure of the damages is already settled between us. And this is the very point that was in view, when the covenant was made; that if they carried out any such goods, they should make such a recompence as was agreed upon. And nothing has happened since the covenant, to alter the nature of it, as some times it falls out.

It is very considerable, that this thing should be settled between us; for if this plea should stand, it may be the overthrowing the act of Parliament and the company too. As for what they say, that it is a new thing; it is quite otherwise, it is the constant article they make with all their supercargoes.

Parker Lord Chancellor. As to the offer made by the bill, to waive penalties and forfeitures; though it is said that the company have informed in the court of Exchequer, yet they have not set forth the term wherein the information was made, nor the particulars for which the information was. But the defendant is to take their words, that there is such an information,

mation, without knowing where to go to the record. Whe a man fets forth, he is intitled to penalties as informer, a waives them; he ought not only to fay that he has informe but to fet it out, fo that it may appear to the court, that I has done fo. Like pleading a former fuit depending, it mu be pleaded fo, that it may appear to the court, of what ten it is, and that it is for the fame caufe.

There is another point, which I think the plea does n cover; for though the defendant is charged to be concern in thofe facts, yet it is laid in the disjunctive, that the defen ants *or* fome of them: He might have faid, that he did n know that any other of the defendants had done any of tho things: and if they had done them, and he was to have fhare with them; yet if they only did them, they only wou be fubject to the penalties.

As to the main point, this covenant is to be confidered relating to a matter which muft in a great meafure lie in t defendant's knowledge. Therefore it is impoffible for t plaintiffs to hope for a fatisfaction, if they cannot get a di covery. They may come to the knowledge of fome thing but it is morally impoffible they fhould come to know a without a difcovery of the defendant.

In the next place, if the defendant has been guilty of fraud, it is a prejudice to the plaintiffs, and the defenda ought to make a recompence, by reafon of that truft they put i him, and by means whereof he had the opportunity of doin that wrong. Therefore from the nature of the truft, and t difficulty for the plaintiffs to come at the knowledge of the tranfactions, it is reafonable they fhould have a difcovery.

But if this covenant is againft law, it muft not take plac It is faid it is againft the nature of a covenant, to reftrain court of juftice, and to ftrip a man of his defence.

I think it is not a covenant to reftrain the court from doi juftice, but to enable the court to do it. It is a covenan that the truth of the cafe, and the whole cafe, fhall be la before the court. There is a great deal of difference in t nature of the defence, upon an anfwer, or upon a plea: Th plea is not a defence to the juftice of the caufe, but to t inquiry; that the defendant may keep back part of the tru from the court. Therefore it is not like the cafe of a covena not to bring a bill to redeem, for a mortgage is an eftate ma to a perfon on condition to be void on payment. If the mon be not paid, the eftate is abfolute at law; but the bufinefs of court of equity is, to let him in to redeem. A covenant to t contrary doth not alter the nature of the fecurity; it ft

continu

continues a security for money as it was before, and is in its own nature redeemable. Such a covenant is to restrain a court from doing what is right and equitable, and is therefore void.

What is the defence in this case? It is, that the defendant is not bound to discover what will subject him to a penalty. It is insisting, that the plaintiffs have no right to demand that discovery. It is a negative privilege, that is allowed by the law, that a man may if he please refuse to discover a matter that will subject him to penalties; it is only a privilege, not a natural right, for then he would shake that natural right whenever he thought fit to make such discovery. If a man will waive such a privilege, surely he may; it is not a thing prohibited by the law. But the reason why he is not obliged to discover, is a want of right in the other party to oblige him to it. But if he will make a discovery he may, nor is any rule of justice or natural right broke by it. Is it unjust, that the whole case should be laid before the court? If the party has not done any thing contrary to his duty, an answer can do him no harm; and why should not this court carry it so far, when there can be no prejudice, unless the party is a knave? And if he be one, shall a court of equity protect him? I am (says he) so fair in the matter, that I will give you a right to examine me. The sending them to law would be to no purpose, for the damages are to be measured by the goods carried out, and without a discovery there is no knowing the *quantum*. The plea must be over-ruled, and the defendants must answer.

The same decree was made in the case of the South-sea company *v.* Bumstead, Mich. 1728. Which see in Abr. Eq. Cas. 78.

Dominus Rex *versus* Inhabitantes Civitatis Norwici.

INformation for not repairing three publick bridges called *Harford* bridges, lying within the county of the city of *Norwich*, leading from the market-cross to *Ipswich*; and sets out that they are out of repair, and that it cannot be found that any person or body politick is bound by tenure or otherwise to repair them, and therefore the inhabitants of the county of the city are bound by the statute: notwithstanding which they have not repaired them, but suffer them to continue in decay.

The King by letters patents may enlarge the boundaries of a city. *B. R.* has concurrent jurisdiction with the sessions about repairing bridges.

Jacob Robins and *Samuel Fremoult*, two of the inhabitants *of the city and county of the city*, come in the name of all the inhabitants *of the city*, and plead Not guilty. Then the record takes notice by way of suggestion, that the question is between the citizens of *Norwich* and the inhabitants of the county of *Norfolk*, and they being interested, there can be no indifferent trial had

there, and *Suffolk* being the next county, the *venire* is awar thither: And at the trial the jury find this special verdict.

That the city of *Norwich* is an ancient city, and has be time out of mind a county of itself, distinct from the cou of *Norfolk*. That the three bridges were at the time of maki the statute 22 *H.* 8. *c.* 5. within the county of *Norfolk*, and within the county of the city of *Norwich*. That *Philip* and *Ma* 1 *April*, second of their reign, reciting the many inconvenie cies which had happened by not knowing the true bounds a limits of the county of the city, severed such an extent ground from the county of *Norfolk*, and annexed it to the ci That the three bridges are within the annexed boundari which are made to extend *usque ad Harford* bridge, which is t farthest of the three. That they are publick bridges, and particular person bound to repair them. That they are out repair: But whether the inhabitants of the county of the c are bound to repair them, is the doubt of the jury, upon whi they pray the advice of the court. *Et si, &c.*

Reynolds Serjeant *pro Rege* made three points. 1. Whether t King can make a county of a city, or enlarge the boundaries a prescriptive city, and make the enlargements parcel of i 2. Admitting he may, whether the enlarged part shall be co sidered as parcel of the old city, so as to charge them with r pairing within the 22 *H.* 8. 3. Whether in this case the farth bridge be within the bounds of the enlargements.

Popham 17. 1. As to the first question, there is no doubt, but that t King may enlarge the boundaries of any city. Most of t cities of *England* are instances of the execution of such a pow and it has been generally done by charter, which was esteem sufficient, without an act of Parliament. This city of *Norwi* was so made at one time or other, for in *Bradley's Treatis Cities and Boroughs* it is mentioned as a borough, and part the county of *Norfolk*. *Henry* the seventh made *Chester* a coun of itself, as appears by 4 *Inst.* 215. 4 *Co.* 33. *a*.

2. Taking it then, that the King can enlarge any city, t next question is, where the charge of repairing bridges with such enlargement lies. The statute lays no absolute charge, t the bridges are in decay; so that when the statute was mad though these bridges were within the county of *Norfolk*, yet they were not in decay, the statute had no operation up them, before they were annexed to the city of *Norwich*. If t hundred were to be made at this day, the statute of hue and c would take place within it. So the prerogative of the King in ca

2 lath

lating to a benefice void by the promotion of the incumbent to a bishoprick extends to a new created parish, as was resolved in Dr. *Birche's* case in *Shower*, where there are many instances of this nature.

3. The third point is, whether one of the bridges be within the annexed bounds; the words are *usque ad pontem de Harford ad exteriorem partem rivi*; and that will take it in. There is a great difference, where *usque ad* is used to terminate a way, and where it is only used as a mark or designation of any conspicuous place. *Calvin*, in his *Lexicon Juridicum*, says *usque ad* is sometimes *inclusionis nota*.

It is objected, that the defendants having pleaded the general issue, could give nothing in evidence, but that the bridges are in repair; and therefore that the trial should have been in *Norfolk*. To this I answer, that generally it is so, as 2 *Lev.* 112. 1 *Sid.* 140. 1 *Keb.* 498. 1 *Mod.* 112. 3 *Keb.* 301. because *prima facie* the inhabitants are chargeable; and if they would discharge themselves, they must do it by special pleading, and not upon the general issue, for the charge on the inhabitants is a common law charge, 2 *Inst.* 701. 1 *Ven.* 256. But these defendants were not chargeable *de communi jure*, but the county of *Norfolk* was; so that they are not obliged to find out who ought to repair, as they are when *prima facie* the charge lies upon them. They might contest the right with the county of *Norfolk* upon the general issue (as indeed they did) and therefore it was proper to carry it into *Suffolk*, the next county. *Vaugh.* 303. 2 *Roll. Abr.* 576. *Cro. Eliz.* 664. *Godb.* 420. *Palm.* 100.

Raby contra. This information is grounded upon the statute; now the statute gives the jurisdiction to the sessions, and where a statute prescribes a particular method, that must be followed. *Cro. Jac.* 643. 2 *Roll. Rep.* 398. 4 *Mod.* 144. 2 *Inst.* 702, 704.

2. The city and county of the city must be be taken to be distinct; and if so, then the citizens only have appeared, for the appearance is *in nomine omnium inhabitantium civit' Norwic'*, and then the issue is not well joined.

3. It is a mis-trial, it should have been in *Norfolk*. That is the next county, and entirely disinterested; for the only question on this issue is, whether the bridges be in repair, for that only can be given in evidence on Not guilty. 1 *Ven.* 256. 1 *Mod.* 112. And on the record it appears not to be a trial in the next county; for the *venire* is awarded to *Suffolk* as the next county, *Norfolk* excepted, and there the trial

should have been. 1 *Inst.* 125, 155. 1 *Roll. Rep.* 28. 279. 2 *Roll. Abr.* 596, 597.

I agree, the King may annex land to a city or county in p of jurisdiction, but not in point of charge; for as to tha still continues parcel of the old county. *Usque ad* is exclu of one of the bridges. As if I prescribe for common *usqu Michaelmas-day*, I have no right of common upon *Michaelı day.*

Reynolds replied. The charge to repair is at common and upon that this information is founded. The statute g a concurrent, but not an exclusive jurisdiction, for here no negative words, nor is this a new offence made by the tute, and upon those grounds it is that the cases went. to the fault in the appearance, which was designed as a tr the inhabitants of the city and of the county of the city all one, for they are commensurate. It is absurd to say jurisdiction of the county shall be abridged in point of i rest, and not in point of charge. The city has the land nexed to them, *et transit cum onere.*

C. J. They who are not chargeable of common right, 1 discharge themselves upon Not guilty: and if so, the trial well in *Suffolk*. If they could only give reparation in evide then it ought to have been in *Norfolk*. There is no doubt the information lies in this case; and as to the appearar we may take them to be the same persons. It seems to that the farthest bridge is included, for it extends *ad exteri partem rivi*. There is nothing in that notion about distingu ing between jurisdiction and charge, for certainly both must together.

Eyre J. inclined, that the trial was right in *Suffolk*, u the distinction taken by *Reynolds*. *Sed adjournatur* to be 1 ther argued. And at another day,

Reeve pro Rege. First exception: That no information in *B. R.* because the 22 *H.* 8. gives the jurisdiction to 1 justices. *Cro. Jac.* 643. 2 *Roll. Rep.* 398. 4 *Mod.* 1 Answer. I agree those cases, for there the statute make new offence, and chalks out a particular method; but was an offence at common law, and the statute does not an exclusive, but only a concurrent jurisdiction. Here ar negative words, though if there were, it has been held negative words shall not take away the jurisdiction of this co 1 *Sid.* 359. 2 *Keb.* 340. 11 *Co.* 64.

Sec

Second exception. They say this cannot be taken to be an information at common law, because it lays, that the defendants *debent reparare virtute, &c.* and concludes *contra formam statuti*. Answer. Such a conclusion will not make it an information upon the statute; for nothing is here alleged, but what the common law said before; and so it has been resolved *Cro. El.* 148. *Cro. Car.* 340. 2 *Roll. Abr.* 82. *pl.* 6. If a statute should add circumstances to a common law offence, yet the indictment need not conclude *contra formam statuti*. 1 *Ven.* 13. 1 *Sid.* 409. 2 *Keb.* 179.

Third exception. The information is against the inhabitants of the county of the city, and the appearance for those of the city only. Answer. Throughout the whole record the inhabitants of the city and county of the city are taken notice of to be the same. The bounds of the city and county of the city are generally the same. 1 *Roll. Abr.* 803. *pl.* 6.

These are all the exceptions taken to the information and proceedings. I come now to the special verdict, upon which two points have been raised.

1. Whether these bridges are within the annexed boundaries; for the defendants say that *usque* being *terminus ad quem*, and *a*, *terminus a quo*, all the bridges are excluded. There can be no dispute but that two of the bridges are included. The question turns upon the third, *usque ad pontem de Harford ad exteriorem partem rivi:* This *usque ad* is only used to shew the circumference, for the other words take in the river. Now if it be taken exclusively, then the whole breadth of the bridge all round must be excluded: Words have been taken inclusively according to the subject-matter. 5 *Co.* 7, 103, 111. 6 *Co.* 4 Inst. 122.
62, 67. 1 *Ven.* 292. 3 *Keb.* 594. 3 *Leon.* 211. The bridges were only mentioned as notorious places.

2. They say here is a mis-trial, for on Not guilty the defendants could give nothing in evidence, but that the bridges are in repair, and therefore the trial should have been in *Norfolk*. Answer. Defendants, by not denying our suggestion, have admitted the question to be, whether the city or county ought to repair. The cases cited of the other side are only, that the person chargeable *de communi jure* shall not give evidence, that another is bound *ratione tenurae*, but that is not our case. If a parish be indicted for not repairing a highway, you must prove it to be a highway, that it lies within the parish, and that it is out of repair; and if there be a failure in either of these, the defendants must be acquitted. 9 *H.* 6. 62. *Bro. General issue* 52, 53, 94. 34 *H.* 6. 43. *Show.* 270.

 Bran-

Branthwayte Serjeant *contra*. I shall speak only to the point of the mis-trial, and upon the information.

As to the first: No admission of the parties can alter the law. It must appear to the court, that the question is of such a nature, as to draw the trial out of the proper county. 2 *Cro.* 597. *Hardr.* 311. Here the only question is, whether the city of *Norwich* is bound to repair, for they cannot throw it any where else, without special pleading. 3 *Keb.* 301. 1 *Mod.* 112. 3 *Keb.* 370. 2 *Roll. Abr.* 597. *pl.* 1.

Secondly, I agree the information would have laid as at common law, if that method had been pursued; but here they make it a statute offence, and therefore they ought to have pursued the statute remedy.

The whole court were unanimous for the King upon all the points, but the mis-trial. As to which the C. J. *Powys* and *Eyre* were of opinion, it was well in *Suffolk*: For the question naturally arises, whether the bridges are in *Norfolk* or *Norwich*; and the result of that is, that either the one or the other is bound to repair; and Not guilty puts all in issue: There was no other way to make this appear upon record, but by suggestion; which not being denied, it is as well as if it it had appeared by special pleading. And it shall not be in the power of the defendants, to disappoint the King of a proper trial, by their refusing to plead specially. *Fortescue* J. *contra*, though the right ought not to be tried in this issue. *Et sic adjournatur.*

The general issue goes to the situation as well as repair of bridges where the charge is of common right.

The cause came now to be spoke to upon the single point of the mis-trial.

Cheshyre Serjeant *pro Rege*. The defendants in this case might put us to prove, in what county these bridges lie; and then the right of repair is a consequence, wherefore the trial is right in *Suffolk*. They could not safely plead the special matter, because it will amount to the general issue, and so be demurrable. 34 *H.* 6. 28, 43. *Bro. issue* 53. 18 *H.* 6. 21. *Fitzh. action sur stat.* 4. 19 *H.* 8. 9. 2 *Roll. Abr.* 683. The defendants might have proved these to be private bridges on Not guilty. 1 *Ven.* 256. The resolution of the case of the *King* v. *Inhab. Hornsey* was contrary to the opinion of *Holt* C. J. in *Show.* 270. for *Eyre*, *Dolbin*, and *Gregory* denied the distinction, though the reporter takes no notice of it. *Mich.* 8 *W.* 3. *Rex* v. *Inhab. Ireton.* The reason of this suggestion was to prevent delay, and is therefore

Fortesc. Rep. 254.

be favoured, since it hinders the defendant from challenging. If he confesses (as he has done here) the truth of the suggestion; then he is estopped: If he denies it, that denial is entered of record, and after that he shall never come and allege that matter as a fault. There is no other way to come at the truth of this fact, but by putting him to confess or deny it, for it is not a matter issuable, *Tri. per pais* 140. *Plow.* 74. *b.* 10 *H.* 6. 54. 14 *H.* 6. 2. *Nient dedire* amounts to a confession, though it does not go on, *fors verum concedit*, as some of the entries are: This confession is as much an estoppel, as in *Salk.* 310. where an executor suffered judgment by default, and then was estopped to say he had no assets.

Pengelly Serjeant *contra*. The matter of this suggestion does not warrant the award of the *venire* into *Suffolk*. It is not averred the county of *Norfolk* is concerned, but only by way of conclusion, *ideoque*, which is not supported by the premisses. I agree the situation might have been contested at the trial. The court might have refused this suggestion, as was done in *Delme's* case. So 2 *Roll. Abr.* 597. *pl.* 1. If the jury had come out of *Norfolk*, we could not have challenged the array. *Hard.* 311. Case for disturbing the plaintiff in taking the profits of a Judge of the sheriff's court in *London*: On Not Guilty, it was suggested, that the office was grantable by the mayor and aldermen, and prayed the *venire* to the next county. But *Hale* C. J. refused to award it, because it did not appear by necessary collection from the record, that the title of the mayor and aldermen to fill up this place would come in question. Though the situation may come in question, yet that does not determine the right; for the defendants will be acquitted without trying the right, so that is not a matter within the extent of this suggestion. Besides, this is of a matter of law, whereas suggestions should be of matters of fact only. *Co. Ent.* 59, 60. 2 *Roll. Abr.* 597. *pl.* 8. 1 *Ven.* 58, 90. *Quo warranto* 28. *Nient dedire* alone is not a confession. *Cro. Jac.* 547. *Dy.* 367. *pl.* 40.

C. J. Since it is admitted, the situation may come in question that will by way of consequence determine the other point, who ought to repair; and therefore the trial could not be in *Norfolk*. I take *nient dedire* to be as much a confession, as *cognovit actionem*. The matter of law in the suggestion arises necessarily out of the matter of fact, and without it, would not be compleat. To which *Powys* J. agreed. *Et per Eyre* J. On Not Guilty, the defendant may controvert every thing the prosecutor is bound to prove. He is bound to prove, where the bridges lie, and therefore *Norfolk* was an improper county. If a man would discharge himself upon a particular account, he must plead it specially; but not where the common right is his defence.

If a man is charged to repair *ratione tenurae*, he may throw i upon the parish by the general issue. The same suggestion wa made in Sir *Richard Onslow*'s case, and no exception taken There is judgment entered in that case of *Hornsey*, *Pas.* 2 *W* & *M. rot.* 31. and in the debate, as I find in my notes, *Ho* C. J. said, the defendants might shew it not to be a highway.

Fortescue J. thought, parcel or not parcel, could not be give in evidence on Not guilty: For 1 *Mod.* 112. *Hale* C. J. said Not guilty goes only to the repair or not; so that as to all othe questions the defendant must plead specially. And *Parker* C. J held so, *Mich.* 10 *Ann.* There being three Judges to one *Judicium pro Rege.*

Trinit

Trinity Term.

5 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Justice.*

Sir Littleton Powys, *Knt.*
Sir Robert Eyre, *Knt.*
Sir John Fortescue Aland, *Knt.*
} *Justices.*

Nicholas Lechmere, *Esquire, Attorney General.*

Sir William Thomson, *Knt. Solicitor General.*

Dominus Rex *versus* Nixon.

THE court refused to quash an information upon motion, which had been exhibited by rule of court: *Eyre* J. observing, that such informations are amendable. 1 *Sid.* 152, 54.

Information not to be quashed on motion. And held so by *Holt* C. J. *Hil.* 8 *W.* 3. *Rex* v. *Gregory*; and he affirmed, the information in *Fountain*'s case, 1 *Sid.* 152. was denied to be quashed. 1 *Salk.* 372.

Dominus Rex *versus* Jones.

THE defendant having treated the process of the court contemptuously, an attachment went against him, without a rule to shew cause, (according to *Salk.* 84.) and there being intimations that he relied on the affistance of his fellow workmen to rescue him, the court sent for the sheriff of *Middlesex* into court, and ordered him to take a sufficient force.

Attachment absolute on first motion, and sheriff ordered to take *posse.*

Between

Between the Parishes of New Windsor *and* White Walth[am]

Certificate concludes the parish that gives it as to all facts therein mentioned. Fortesc. 304.

JOHN Pissey, being legally settled in the parish of *W[hite] Waltham*, where he had lived two years with a woman [who] was reputed his wife, went with a certificate from *White W[al]tham*, owning them as man and wife, into the parish of *N[ew] Windsor*, where they had six children. Then the man dies, [and] the woman swearing they had never been married, the justi[ces] adjudge the children to be bastards, and settled in *N[ew] Windsor* where they were born.

Reeve moved to quash the order, because the evidence [of] the mother ought not to be admitted, and because the certific[ate] was conclusive to the parish of *White Waltham*, to say they w[ere] not man and wife. For as no parish can refuse a certifica[te] man, therefore whatever is the import of that certificate m[ust] be binding, else it would be hard to get rid of such people.

Yorke contra. It is a rule, that bastards are settled where bo[rn], and I believe it will not be pretended, that the bastard o[f a] certificate-man can be sent back with him. But the only qu[es]tion will be, whether the legitimacy of the marriage could co[me] in question at the sessions. As to the exception about the m[o]ther's evidence, I take it not to be material in this court, w[hat] evidence the sessions went upon. If the justices give an ins[uf]ficient reason for their adjudication, yet that is no ground [to] quash the order. Their adjudication, that such a place is t[he] place of the last legal settlement, is conclusive to this cou[rt], though they shew in the face of the order an act which in l[aw] will not gain a settlement; for they, and they only, are judg[es] of the fact, and this court only declares the law arising fr[om] that fact. If a jury finds not only the fact, but the eviden[ce] of it; yet you put the evidence out of the case, without dete[r]mining whether it be sufficient or not, and adjudge upon t[he] fact only. The mother's evidence is good, for she is a stran[ger] *quoad* the parish. *Salk.* 478.

As to the certificate, that cannot enure by estoppel as [a] deed. The sessions are *quasi* a jury, and not bound by esto[p]pels. 4 *Co.* 53. *b.* *Salk.* 276. *Adjournatur*; and the last d[ay] of the term the Chief Justice delivered the opinion of the cou[rt].

C. J. We are all of opinion, that the certificate is concl[u]sive to the parish of *White Waltham*, and they are not to [be] admitted to dispute the validity of the marriage, and therefo[re] the six children, being actually chargeable to *New Windsor*, mu[st]

be sent back to *White Waltham*. There is no doubt but the bastard of a certificate-man is settled in the place of his birth, for he is not such an issue as will follow the settlement of his father or mother, neither is he *his* or *her* child within the intention of the statute, so as to be sent back with the parent. Bastard of a certificate-man settled where born. Salk. 535. *Post.* Trin. 15 Geo. 2.

Dominus Rex *versus* Corrock.

INdictment for not repairing a highway, which the defendant was obliged to do *ratione tenurae* of a certain house, which in another place is mentioned to be the mansion-house of the defendant. Sufficient to charge a man to repair, *ratione tenurae*, without *suae*.

Yorke objected, that by 5 *H.* 7. 3. it appears that the occupier and not the owner is chargeable to repairs of the highway, and therefore the indictment should have been *ratione tenurae suae*, for it may be this house is let to another, and cited *Noy* 93. *Lat.* 206.

Et per curiam, (upon consideration) There is no necessity to lay it so, for *ratione tenurae* implies it to be such a tenure, as makes him chargeable. And so it was held 1 *Ven.* 331. *Rex* v. *Fanshaw*, which is entered *Mich.* 29 *Car.* 2. *rot.* 12. There he was charged *ratione tenurae quorundam terrarum et tenementorum*, and the exception was taken, for want of *suarum*, and the indictment held well enough. But if it were necessary to lay *suae*, we think it is implicitly averred, by calling it afterwards his mansion-house; so *quacunque via data*, the indictment is well enough.

Argyle *versus* Hunt.

LIBEL in the spiritual court for the word *whore*, which upon the face of the libel appeared to have been spoken in *London*, and after sentence, *Corbet* moved for a prohibition, because the defect of jurisdiction appeared in the libel itself; and the court will judicially take notice of the custom of *London*, where an action lies for the word *whore*. *Show.* 301, 331. 1 *Roll. Abr.* 550. 2 *Roll. Abr.* 69. 1 *Lev.* 116. *Sty.* 69. 1 *Inst.* 96. *b.* *Ketelbey contra.* It is now too late, and it should have been pleaded below. *Lutw.* 1023. *Et per curiam*, The rule is, that you shall never allege matter *dehors* the libel, as a ground for a prohibition after sentence: but the foundation of our granting it must arise out of the libel itself, in defect of jurisdiction. And if there be a defect of jurisdiction appearing in the libel, then the party never comes too late: for the sentence and all other proceedings are a mere nullity. But where the

No prohibition after sentence, though word *whore* appears to be spoke in *London*.

Andrews 305. S. C. S. P. See 4 Vin. Abr. 11.

the ſpiritual court has an original juriſdiction, which is to taken from them upon account of ſome matter ariſing in ſuit, as for defect of trial: there, after ſentence, the party ſl never have a prohibition; becauſe he himſelf has acquieſced their manner of trial; which is a waiver of the benefit c common law trial. It is true, theſe words appear to be ſp in *London*, but how does the cuſtom of *London* appear to There is nothing of that in the libel: and though we have ſ a private knowledge of it, that upon motion we do not put party to produce an affidavit, becauſe the other ſide never putes it; yet we cannot judicially take notice of it, and if body will inſiſt on an affidavit, we muſt have it in every c: It was never known that the court judicially takes notice private cuſtoms: but they are always ſpecially returned. *M.* 9 *Ann. Stone* v. *Fowler*. There was a preſcription for the riſhioners to repair the fences of the church-yard; and a ſentence they came and ſuggeſted, that the rector was bound thoſe repairs, and that the ſpiritual court, in as much as preſcription was not admitted, had no power to proceed: the court held they came too late after ſentence. A prohi tion was denied.

Bellew *verſus* Aylmer.

In ſcire facias againſt executor, no coſts.

IN a *ſcire facias* againſt an executor, execution was award and then the record went on with a *conſideratum eſt eti* that the plaintiff ſhould have coſts. It was admitted that 8 & 9 *W.* 3. *c.* 10. which gives coſts on a *ſcire facias*, does extend to executors, and therefore the judgment for coſts erroneous. But then it came to be the queſtion, whether court ſhould reverſe the whole judgment, or only *quoad* the co And *Fazakerley* for the executor inſiſted to have it reverſe *toto*, for that it was one intire judgment, on which they c not have ſeveral executions. *Cro. El.* 162. There were mages given to the crown in a *quare impedit*, and the ju ment reverſed *in toto*. So is 1 *Leon.* 149. *Allen* 74. If defendant dies, and judgment is againſt all; it muſt be ent ly reverſed. 1 *Roll. Abr.* 775. *pl.* 2. 2 *Keb.* 696. 1 *Abr.* 775. *pl.* 4. 1 *Ven.* 27, 39. *Cro. Car.* 471. *Salk.*

What judgment may be reverſed in toto, and what in part only.

Reeve contra. If the record had ſtopped at the awardin execution, no doubt but all would have been well enou And then when it goes on with a *conſideratum eſt etiam*, is a diſtinct independent judgment, and may be reverſed with affecting the other. If part of the words laid are not actiona and ſeveral damages are given, judgment ſhall be reverſe part only. *Hob.* 6. (*ſed vide Salk.* 24. that caſe denied for la

2

2 *Cro.* 343. *Moor* 708. *Cro. El.* 538. I agree the caſe in *Hob.* is denied in 2 *Cro.* 424. But the reaſon on which it was denied doth not impeach the authority of it as to my preſent purpoſe in this caſe, where there are two different judgments. 1 *Roll. Abr.* 776. *pl.* 7. 5 *Co.* 58. As to the caſe *Salk.* 24. my report differs from it, for I took the damages to be ſeveral, but he reports them to be entire.

Per Curiam: Conſideratum eſt etiam does not disjoin it at all. If a man declares for two ten pounds, it is the ſame thing whether the judgment be entire for 20*l.* or ſeveral, for each 10*l.* *Adjornatur.* 2 Saund. 257. 1 Sid. 357.

And *Hil.* 7 *Geo.* without farther argument it was reverſed as to coſts, and affirmed *pro reſiduo*, on the authority of *Green* v. *Waller*, *Hil.* 13 *W.* 3. *rot.* 20. and adjudged *in B. R. Trin.* 2 *Ann.* on error out of *Ireland:* It was reverſed as to coſts, and affirmed as to the reſt. Lill. Ent. 233.

Dominus Rex *verſus* Inhabitantes de South-Marſton.

THE order run, "Whereas *J. Charlwood* and his wife *is* "come into your pariſh endeavouring to ſettle *themſelves* "contrary to law, and *are* likely to become chargeable: Theſe "are therefore to require you, to convey the ſaid *Charlwood* "and his wife *from your* ſaid pariſh to the pariſh of *A.* &c. In orders of removal it is not neceſſary to ſay, the party is come into the pariſh. 19 Vin. Abr. 409. pl. 8.

Martin moved to quaſh the order, for the incertainty whether the huſband or wife came into the pariſh, it being in the ſingular, when it ſhould have been in the plural number; and cited *Salk.* 122. where an order of two juſtices was *doth*, and quaſhed. *Trin.* 11 *Ann*, *Regina* v. *Ingham*, *inſultum fecit* againſt two defendants, and held ill. 2 *Keb.* 51.

Huſſey contra. The ſingular number will ſerve for huſband and wife, though for no others. The caſe of an indictment will not govern this, for that is always conſtrued ſtrictly, but theſe have a liberal conſtruction. Nor is the caſe in *Salkeld* at all applicable, for there the fault was in the adjudication itſelf, but here it is only in the complaint. I ſee no more neceſſity to ſhew them in the pariſh, than there is to ſay did not take 10*l.* *per annum*, or ſerve a pariſh office which is never required. But if it be neceſſary, it appears ſufficiently upon the whole order. It is ſaid, endeavouring to ſettle *themſelves*, and that they *are* likely to become chargeable, and then they are ordered to be removed *from* the pariſh. *Et per Pratt*, C. J. I do not think it neceſſary to ſhew they came in, but only an endeavour to ſettle; for that may be where the party never came in, as the caſe of children born

born in one pariſh, when the ſettlement of the parent is in another. But if it were neceſſary, it is implicitly ſet forth, which in the complaint is ſufficient. To which *Powys* and *Eyre* Juſtices agreed. *Et per Forteſcue* J. The only two things requiſite for the juſtices to adjudge, is the place of the laſt legal ſettlement, and that the party is likely to become chargeable. And theſe muſt be poſitive, though as to the complaint it is well enough to take it by implication. This is not falſe grammar, as *doth* was in *West*'s caſe, for it is common for *Latin* authors to put the ſingular number, where there are two nominative caſes. *Horace* ſays *Detur nobis locus, hora*. If it were neceſſary to ſtrain a point, we might refer *is* to the huſband, and then the wife will follow of courſe. The order was confirmed.

Complaint may be taken by implication, but not the adjudication.

Dominus Rex *verſus* Munden

Man not bound to maintain his wife's mother. Settlem. and Rem. 91. Forteſc. Rep. 303. 2 R. Raym. 1454.

ORDER, reciting that *Munden* had a good fortune with his wife, and that her mother was poor, therefore he is ordered to provide for her. And in maintenance of the order 1 *Bulſt.* ——— and 2 *Bulſt.* 345. *Styles* 283. were cited. *Et per Pratt* C. J. On conſideration, we are all of opinion, that the ſon-in-law is not bound, either within the words or intent of the ſtatute, which provides only for natural parents. By the law of nature a man was bound to take care of his own father and mother; but there being no temporal obligation to enforce that law of nature, it was found neceſſary to eſtabliſh it by act of Parliament, and that can be extended no farther than the law of nature went before, and the law of nature does not reach to this caſe. As to the caſe in 1 *Bulſt.* it is plain the word not was left out only by miſtake, for the ſenſe of the clauſe leads you to read it *not obliged*, and beſides the judges were divided. The caſe indeed in 2 *Bulſt.* is an authority in point as far as it will go, but that is no judicial authority, only a caſe at a Judge's chamber. The ſame was alſo ſaid *obiter* in the caſe of *The Queen* v. *Fane*, *Paſch.* 10 *Ann.* but it never came judicially before the whole court till now. And therefore as it is *res integra*, we are of opinion the order muſt be quaſhed.

Dominus Rex *verſus* Gill & al'.

Man not criminally anſwerable for a caſual damage done to another.

INdictment for throwing down ſkins into a man's yard, which was a publick way, *per quod* another man's eye was beat out. On the evidence it appeared, the wind took the ſkin, and blew it out of the way, and ſo the damage happened. The Chief Juſtice remembered the caſe of the hoy (*ante* 128.) and that in *Hob.*

Hob. 134. where, in exercising, one soldier wounded another, and a case in the year-book, of a man lopping a tree, where the bough was blown at a distance and killed a man. And in the principal case the defendants were acquitted.

The Attorney General *versus* Elliston et al'. In Scaccario.

SCIRE *facias* on a bond conditioned to transport coffee, and not reland it. The defendant as to part pleaded the statute of equity of *Hen.* 8. That he did not transport the coffee, because, when it was in the ship, one of the officers of the customs came on board and seized the coffee, and carried it back to *London:* That when it was cleared, he continued the voyage, till he met with a tempest, in which both ship and coffee were lost. And as to the residue of the coffee, he pleaded it was never relanded. The attorney general replies, that the seizure was, because the coffee was unshipped with an intent to be relanded; and on a traverse of this they are at issue, and it is found with the King.

If the plea contains matter of excuse, it is enough for the plaintiff in all cases, but that of an award, to falsify the excuse.
33 H. 8. c. 39. §. 31.

It was moved in arrest of judgment, that here was an immaterial issue, for the bond being only not to reland, the replication only discloses evidence of an intent to reland, which is not sufficient to subject him to the penalty. On the other side it was said, that the plea had admitted a non-performance, by offering an excuse; and then it was sufficient to meet the plea, and falsify the excuse, in all cases (that of an award only excepted) for there indeed, if the defendant pleads *nul agard fait*, the plaintiff must not only shew an award, but he must go farther and assign a breach. *Salk.* 138. But in no other case is he obliged to do more, than falsify the defendant's plea. And of this opinion was the court, and judgment was given for the plaintiff.

Windmil *versus* Cutting.

PER *Curiam:* An attorney of *C. B.* who is actually in the custody of the marshal of this court, shall never be suffered to plead his privilege. 2 *Roll. Abr.* 232. For there is a great difference between an actual, and supposed custody. 1 *Salk.* 1. *Et per Fortescue* J. As to the plea that a man is a clerk of one of the prothonotaries of *C. B.* I have looked a little into it, and find the old way of pleading was, that they were employed in ingrossing of records, *assidentes in curia*, and the like. *Rast.* 473. *b.* 34 *H.* 6. 15. And so in this court of late years an affidavit has been required to that effect, *Cooke* v. *Latimer*, *Read* v. *Chambers*, and the case of one *Worthington*, 11 *Ann.*

Privilege *del C. B.* where pleadable.

Fortesc. Rep. 342.

11 *Ann.* In the case of *Baker* v. *Swindon*, *Mich.* 10 *W.* *C. B. rot.* 360. a clerk pleaded, that he ought to be sue bill, and not by original, but the court held the contrary that attornies only have that privilege.

Clift. 572.

Anderson *versus* Buckton.

Where the plaintiff shall have full costs though the damages are under 40*s.*

TRespass for the entry of diseased cattle into the plain close, *per quod* the plaintiff's cattle were infected. guilty pleaded, and a verdict for the plaintiff for 20*s.*

It was moved, to allow the plaintiff his full costs, upon account of the special damages alleged and put in issue, which would have subsisted of itself as a distinct cause o tion, and the plaintiff ought not to be punished for joini with the trespass, to avoid vexation. And *Cro. Car.* 307. 3 *Mod.* 39. 2 *Ven.* 48. *Cro. Car.* 141. *Ray.* were cited.

On the other side it was insisted, that though here is m of aggravation laid, yet it is still to be considered as an a of trespass, in which there is a recovery under 40*s.* matter alleged only by way of aggravation cannot intitle plaintiff to full costs. 2 *Ven.* 48. *Salk.* 642.

The Chief Justice, *Powys* and *Fortescue* Justices, were full costs, because the consequential damage is a matter which the plaintiff might have had a distinct satisfaction. they likened it to the case of an action of battery, *per consortium* of the wife, or *servitium* of the servant, *amisit*, w for that reason are not within the statute. The true disti tion is, where the matter alleged by way of aggravation intitle the party to a distinct satisfaction. Asportation of i may be a ground for a trover, but yet may be laid as an gravation in trespass, and the plaintiff shall have full c If a man enters and chases and kills my cattle, that is a dis wrong, but yet may be joined as matter of aggravation; pose I have two closes at a great distance, and the same w course running through both, I may allege the entry into *per quod* the water was prevented from coming to the o and there shall be full costs.

Eyre J. *contra*, Because this recovery will not be plead to a special action upon the case for a special injury, *quod teri neguaverunt*. And the plaintiff had full costs.

Dom

Dominus Rex *versus* Kinnersley and Moore.

INformation, setting forth, that the defendants *Kinnersley* and *Moore*, being evil disposed persons, in order to extort money from my Lord *Sunderland*, did conspire together to charge my Lord with endeavouring to commit sodomy with the said *Moore*; and that in execution of this conspiracy they did in the presence and hearing of several persons falsly and maliciously accuse my Lord that he *conatus fuit rem veneream habere* with the defendant *Moore*, and so to commit sodomy. The defendant *Kinnersley* only appears, and pleads to issue, and is found guilty, and now several exceptions were taken in arrest of judgment.

Conspiracy may be laid without any overt act, if one be convicted, judgment shall be given against him before the trial of the other.

Branthwayte Serjeant. The nature of the offence must appear upon the record, for by that only the court must judge, and the offence must be particularly and certainly alleged. *Conatus fuit* is incertain, for it might only be an act of the mind, which before it was put in execution was suppressed by reason. 1 *Roll. Rep.* 79. 2 *Bulst.* 276. In an action for words, *per quod maritagium amisit*, the plaintiff declared, that whereas he *intendebat et conatus fuit* to marry such a woman, the plaintiff spoke of him such words *per quod*, &c. and this was held to be incertain, and the judgment was arrested.

2. It should appear upon the record, that the party accused is innocent; for it is no crime to charge a guilty person with such an offence. They should have averred, *ubi revera et in facto he non conatus fuit* to do the act with which he was charged. *Hut.* 11, 49. In actions for a malicious prosecution the plaintiff must shew the former action to be determined, and how; so likewise he must shew an acquittal upon an indictment. 1 *Leb.* 881.

3. To every conspiracy there must be two persons at least, whereas here is only one brought in and found guilty. If hereafter the other should be found Not guilty, that will consequently be an acquittal of *Kinnersley*. If three be indicted for a riot and an assault, and one only found guilty, and the others acquitted; this discharges them all, because the riot is the foundation, and the assault only the consequence. *Salk.* 593. And one person alone cannot be guilty of committing a riot: So in this case one cannot be guilty of the conspiracy, though he may of the overt act, and yet the foundation (which is the conspiracy) being removed, the other part, which is only the consequence, falls of course.

Plow. 111. b. Poph. 202.

Comyns. Bare words are not a sufficient overt act, without alleging something actually done towards putting the conspiracy in execution. 4 *Co*. 16. *a*. 1 *Roll. Abr*. 110. *p*. 6. 9 *Co*. 56. *b*. For if there be only words, an action of *scandalum magnatum* lies. If the charge on my Lord was by course of law, then the defendants are justified, till it is falsified in a legal manner, either by *ignoramus* or acquittal. 1 *Roll. Abr*. 113, 114. *R* 2. And the court will not suffer the party accused to bring his action, till he has manifested his innocence; because otherwise there might be contradictory judgments, for the parties might be condemned in an action for that prosecution, which they might afterwards establish, and then those two judgments would be inconsistent. 3 *Keb*. 799.

Hob. 267. Salk. 15.

The offence with which my Lord is charged is no crime punishable by our Law. For a bare endeavour (which is the most that is alleged) to do such an act, is not punishable in the temporal courts. And the only reason why it is actionable, to say of a woman that she had a bastard is, because she is punishable for it by 18 *Eliz*. *c*. 3. and 7 *Jac*. 1. *c*. 4. *Poph*. 36. nor is it actionable then, unless it appears the parish was charged. *Salk*. 694. So to say she keeps a bawdy-house, because the common law punishes such a person. *Cro. Car*. 329. And yet it is not actionable to call a woman a bawd, which is only an offence cognizable in the spiritual court. 1 *Ven*. 53.

If *Moore* should die, be pardoned, or acquitted, how can the other be guilty of a conspiracy? *Cro. El*. 701. 1 *Ven*. 234. 3 *Keb*. 111. 1 *Saund*. 228. 2 *Keb*. 476. 1 *Keb*. 284. 1 *Roll. Abr*. 111. *pl*. 5.

Adjournatur; and at another day *Reeve* in answer to the objections argued:

1. As to the *conatus* being uncertain. This goes to their own charge; from which we would not vary, but were obliged to lay it as we could prove it. We could not lay, that he said my Lord did the act, when he only said he endeavured to do it. The case in 1 *Roll. Rep*. 79. and 2 *Bulst*. 276. is not applicable to this. There it was in the plaintiff's power to have been more particular, and the words were not actionable without a special damage: He should have shewn a treaty and communication between himself and the lady, whereas he only says he intended and went about to marry her, and it does not so much as appear she knew any thing of the matter. In many cases it is actionable to charge a man with a bare attempt to do an unlawful act. *Cro. El*. 6. You lay in wait

ne ; surely it is. But if it be not, yet we insist there
o occasion to lay any. The conspiracy is the *gist* of the
, and the other only matter of aggravation, of which
fendant may be acquitted, and found guilty of the con-
notwithstanding. 1 *Ven.* 304. 1 *Sid.* 174. 1 *Lev.*
So 1 *Lev.* 62. 1 *Keb.* 203, 254. A conspiracy to
a man with being the father of a bastard child was
ell laid, without any overt act. 27 *Ass. pl.* 44. 16 *Ass.*
. There were differences in opinion as to this matter
rly, but now the law is settled.

Say they, no judgment shall be given against *Kinnersley*,
se possibly *Moore* may be acquitted, and that will be an ac-
l of both. This is arguing from what has not hap-
, and probably never will ; for though *Moore* may have
portunity to acquit himself, and is not concluded by
erdict as *Kinnersley* is ; yet as the matter now stands
himself is found guilty, for the conspiracy is found as
id, and therefore judgment may be given against one
the trial of the other. As 4 *E.* 3. 34. *b.* *Bro. Conspi-*
1. 1 *Ven.* 234. 3 *Keb.* 111. 24 *E.* 3. 73. *a.* *Pas.*
. *B. R.* *Regina* v. *Herne.* There the indictment was
e *with* A. *et multis aliis* did conspire to accuse *B.* that
attempt to commit sodomy. The grand jury found the
to *Herne*, with an *ignoramus* as to *A.* *Herne* was con-
, and then it was moved in arrest of judgment, that there
an *ignoramus* as to *A.* *Herne* could not be guilty of con-
g with him, But the whole court over-ruled the ex-
n, and said it was sufficient, being found that he *cum
aliis* did conspire, and that it might have been laid so
t; and *Herne* was fined forty marks, and set in the pil-

laid, that the defendants did *falsly* charge, which could
be, if the accusation was true. *Trin.* 4 *Ann.* *Regina* v. *B*
Salk. 174, 376. indictment setting forth that the defenda
falso conspiraverunt to charge *A.* with being the father of
bastard child: On demurrer the exception was, that there w
no averment, that *A.* was not the father; and upon great co
sideration and search of precedents, the indictment was h
good. A difference was taken in an indictment for perju
where you must aver the oath false; and also in actions for
malicious prosecution, where it must appear the party was i
nocent, to intitle him to damages. *F. N. B.* 114, 11
Rast. 117.

5. The last exception is, that the offence charged is n
punishable in the temporal courts. We deny that. Attemp
of this nature have been punished, and so have conspiracies
do a lawful act, which is stronger than this case.

The whole court were unanimous in over ruling all t
exceptions. And *Powys* J. quoted a case in *Godb.* where
man was punished for an attempt to pick a pocket. An
Eyre J. remembered Captain *Rigby*, who was pilloried for
attempt to commit sodomy. And he quoted *Trin.* 11 *W.*
Rex v. *Sudbury & al'*, where four were indicted for a riot, tw
found guilty, and the other two acquitted; and this was he
to be a discharge of them all, though it had been otherwise
it had been laid *cum multis aliis*. And *Hil.* 2 *Ann.* *rot.* 17
a case to the same purpose as the *Queen* and *Best.* Et p
Fortescue J. *falsis allegantiis* is in the commission of *oyer* and *te*
miner. And *Holt* C. J. held in *Best's* case, that an attempt
do an act cognizable in the spiritual court was punishable he
In foro conscientiae the attempt is equal with the execution of i
and there is a great difference between being found Not guilt
and not being found guilty.

See 4 Bur. Rep. 1283.

Whereupon judgment was given for the King, and afterwa
the court proceeded to sentence, and told the defendant, n
thing but his being a clergyman protected him from a corpo
punishment. They fined him 500 *l.* a year's imprisonme
and to find sureties for his good behaviour for seven years.

In *Easter* term, 5 *Geo.* *Moore* was convicted and sentence
to stand in the pillory, suffer a year's imprisonment, and to fi
sureties for seven years.

One in execution is not to have the benefit of the rules.

And this term *Kinnersley*, on affidavits of his being indispose
moved the court that he might be admitted to the benefit of t
rules. *Sed per curiam*, We never do it for one in executio
whi

which differs from the case of persons committed for high treason, who have been bailed on account of illness.

Wraight *versus* Kitchingman.

ERROR *e C. B.* of an award of execution in a *scire facias* upon recognizance of bail, reciting that the defendants in *Hilary* term 3 *Geo. coram Justitiariis de C. B. manuceperunt et uterque eorum manucepit pro Richardo Welbourn in* 106 *l.* Upon condition, that if he should happen to be condemned in a certain plea of debt upon demand for 53 *l.* at the suit of *Kitchingman* and his wife, then the said *Welbourn* should pay and satisfy the said 53 *l.* and all damages, or render his body in execution of that judgment. And then the *scire facias* sets forth, that *licet* the said *Kitchingman* and his wife recovered the said 53 *l.* debt and 15 *l.* for damages, yet the said *Welbourn* never rendered his body in execution of the said judgment, or satisfied the said debt and damages. Upon a *scire feci* returned, there is judgment by default, and execution awarded. The defendants assign for error, that the plaintiffs in *Hil.* 3 *Geo. obtulerunt se* against the said *Welbourn de placito transgressionis acetiam in quodam placito debiti super demand* 53 *l.* upon which process issued against him, returnable *in octabis purificationis*: at which day the defendants entered into recognizance for his paying the debt or rendering his body: And that the plaintiffs did not within two terms, according to the course of the court, declare against the said *Welbourn in placito praed'*, whereby the recognizance was discharged: But farther they say, that the plaintiffs in *Trinity* term following caused him to be summoned into the said court to answer them in a plea of debt for 53 *l.* and obtained judgment thereupon, and that such judgment was had upon those proceedings, and not in that action wherein the defendants became bail; but notwithstanding this, the award of execution is grounded upon the judgment in that collateral action. The other errors assigned are, that the Justices of *C. B.* had no power to take any recognizance in this form, and that there is a discontinuance, and several variances between the recognizance itself and the recital of it in the *scire facias*. The defendants verify their assignment of errors, by procuring the recognizance entered with a *placita* of *Hilary* term, and the other proceedings with a *placita* of *Trinity* term, to be sent up by *certiorari*, with a certificate that there are no continuances from *Hilary* to *Trinity* term. And *in nullo est errat'* pleaded.

Matter which lies properly in the mouth of the principal, or might have been pleaded to the *scire facias*, is not assignable for error after execution awarded. Salk. 262. 4 Mod. 306.

Strange pro quer' in errore. Before I enter into the debate of our exceptions, I must beg leave to observe, that as this record stands, the fact of our assignment of errors must be taken to be

 as

as we have alleged it; for we have not only verified it by the return of the *certiorari* (which is the proper trial in these cases but the other side have come into it, by pleading *in nullo est erratum*, which is a confession of the matter of fact, and serves to put the law arising from that fact in issue before the court: is in effect to say, I agree the proceedings were in the manner you mention, but notwithstanding this, I insist they are regular; they are not erroneous. So is 1 *Ven.* 252. 1 *Sid.* 14;

I shall at present omit observing what those facts are, which stand admitted upon this record, but shall make use of that observation, as occasion shall require, in speaking distinctly to each exception.

Our exceptions are of two sorts. 1. Such as go the form; and 2. To the foundation of this *scire facias*.

Those which respect the form are, either such as arise upon the face of the writ itself, or by comparison of it with the other parts of the record.

The exception I take to the writ itself is, that the breach is not well assigned, for they only say, that *licet* such recovery against the principal, yet he never rendered his body *in executione judicii praedict'*, which ties it up to a particular kind of render, and has not left it at large to any render which would be a good discharge of the recognizance. And therefore though I must admit, he did not render himself in execution of that judgment; yet if I can shew, that notwithstanding what the plaintiffs have alleged, the condition of this recognizance may have been performed; then I shall be well justified in saying, the breach is not well assigned.

A render may be either before or after judgment, and it may happen, that though either of these will discharge the bail, yet neither of them may be a render in execution of that judgment. It is plain, the first cannot: There cannot be a render in execution of a judgment, when as yet there is no judgment; but yet it will not be denied, but that a render before judgment is a good discharge of the bail, for the intent of the condition is answered, inasmuch as the party is forth coming, and the other may have his body as a satisfaction for the debt when recovered.

And as there may be a render before, so likewise after judgment, and yet not in execution of that judgment. For suppose the bail bring the principal into court, and leave him there, and the plaintiff refuses (as by law he may) to take him in execution; I believe no body will say this is a render in execution

cution of that judgment, and yet there is no doubt but this is a good discharge of the bail; for it amounts to a performance of the condition: And in this case the entry is not, that he was rendered *in executione judicii*, but *in exoneratione manucaptor'*. And if the plaintiff will not pray him in execution, the consequence of that is, that he must be discharged. So is *Hob.* 210. *Walby* v. *Canning*.

Since therefore it appears, there are more ways than one to perform the condition of this recognizance, I need not cite many cases to prove, that the saying the principal did not render in one particular manner, will not amount to an averment that he did not render at all. If a man is bound to go to *York* or *Lancaster* by such a time (where according to Sir *Rowland Heyward*'s case, 2 *Co.* 35. he being the party agent, has his election to go to which he pleases) it would be insufficient to say he did not go to *York*, because though that be true yet he may have performed the condition by going to *Lancaster* within the time: And for this the book of 21 *Ed.* 3. 29. *b.* is an authority, where both parts of the disjunctive are possible (as in the case I now put) though it was otherwise resolved there in the principal case, because it appeared that one part of the condition was become impossible by the act of God, and therefore as to that there was no occasion to take any notice in assigning the breach. If I covenant to do an act by myself or my assigns, the breach must be in the disjunctive, so as to take in both ways by either of which that act might be done. So is *Cro. Eliz.* 348. *Salk.* 139.

The same exception was taken about two years since in the case of *Read* v. *Jenamie*, but I cannot say it received any judicial opinion. The court did seem to come into it, and the plaintiffs discovering their opinion, would not stand another argument, but applied below and got it amended.

The next exceptions to the writ are such as arise by comparison of it with the other parts of the record, from which it varies in several instances. I forbear to mention them all, but shall rely upon those which I apprehend to be most material. But before I do this I must observe, that we are in the case of a description of a record, which the court requires to be made strictly, and more strictly where the suit is founded upon that record, than where it is only described in a writ of error, in order to remove it out of one court into another. And there will follow no inconvenience, if the court in these cases ties up the party to an exact description; because if he be but careful he may do it with the utmost exactness, and it is his own laches if he mistakes.

The first variance is, that in the writ it is said, the defendants *manuceperunt et uterque eorum manucepit pro Richardo Welbourn in* 106 *l.* whereas the recognizance runs, that they *recognoverunt et uterque eorum recognovit se debere eisdem* the plaintiffs *in* 106 *l.* Now the words *manucapio* and *recognosco* are of different significations: The latter indeed does import a being bound in a sum, and therefore is properly used in these cases; but *manucapio* was never taken in that sense: It signifies a receiving another into custody, of which the usual expression is, *quod traditur in ballium.* There is a great difference between *recognovit se debere* so much, and *manucepit* in so much: For *recognovit se debere* creates a duty to the party, and is an immediate lien; but *manucepit pro J. S.* is no lien as to the plaintiff in the action, no more than to any body else. It may as well refer to the court who delivers out the party, and thereupon he undertakes to the court that the party is forth coming. It is not *manucepit to the plaintiff* for such a one, but *manucepit* generally, which form may be proper to be used in this court, where the bail is not bound in a sum certain, but the *quantum* left entirely uncertain till judgment; whereas *in C. B.* where the sum is mentioned, and thereby reduced to a certainty, they use the strongest words to bind the party, so as to make it a certain duty depending only upon a condition subsequent. And in this case I must submit, whether it is not releasable by the word *debts*, as a bond is before it becomes due, because it is *debitum in praesenti quamvis solvendum in futuro*, according to *Co. Litt.* 292. *a.* But according to *Hoe*'s case, 5 *Co.* the word *debts* will not release a recognizance of bail entered into in this court, because there is no certain duty created at the time of entering into it.

The next variance is, that the writ runs, *quas quidem* 106 *l.* *iidem* the bail *recognoverunt de terris et catallis suis fieri*, whereas the record is *voluerunt et concesserunt*, which are the proper words in that place, for though *recognosco* be proper to signify they bound themselves in that sum, yet *concedo* is always used when they come to describe in what manner the parties agree it shall be levied. They *recognoscunt se debere* so much money, which they *concedunt* shall be levied in such a manner.

The other instances of variance are, where the writ contains more than is in the record. And to these I would premise a distinction, which I have often heard laid down in this court, and that is, where records exceed, and where they do not come up to the description: Where they exceed the description, it will be well enough, for every excess implies a fullness, and if there be a full answer to the description it is as much as is required; but

but it is otherwife, where the record does not come up to the defcription, according to the cafes fo often cited of late of *Rogers* v. *Lloyd* and *Alfton* v. *Lucan*. In one the writ of error contained an addition, which was not in the record, and for that variance it was quafhed; but in the other, where the writ had omitted the addition, the record was held to be well removed.

And if the crouding in an unneceffary defcription in a writ of error, to which the record does not anfwer, will for that reafon vitiate it; I may argue *a fortiori* in the cafe of a *fcire facias*, which is in the nature of an action; for there the court is ftricter than in writs of error, in requiring an exact defcription, becaufe otherwife the party might bring two actions, the one varying from, and the other agreeing with the record.

The firft variance is, that by the *fcire facias* the defendants were to forfeit the money, if the principal fhould happen *in aliquo modo defaltam facere*; but there is not a word of this in the recognizance itfelf.

Another variance is, that in the writ the defendants are made to undertake, that if the principal be condemned in that action, or judgment be given for the plaintiffs, that then he fhall pay. In the record it is only that if judgment be given for the plaintiffs, without any mention of being condemned.

In one he is to render damages *in curia affidenda feu aliquo modo adjudicanda*, but the recognizance is only for damages *in curia adjudicanda*, without any mention of the words *affidenda feu aliquo modo*.

It will perhaps be faid, that thefe variances are not to be regarded, becaufe they do not alter the fenfe. But that will be no anfwer at all. In Dr. *Drake*'s cafe, *Salk.* 660. the word *nor* was put inftead of *not*, but it was not in a place where it influenced the fenfe one way or the other, and yet the court held it a fatal variance, for it was the careleffnefs of the party: And *Powel* J. faid, that in all cafes where the party had a record or other matter by which he *might* make an exact defcription; in fuch cafe every variance was fatal. That if the court once gave into folutions of thofe variances, they would never know where to ftop; and for my part, fays he, whilft I keep up to the fettled rules, I look upon myfelf as lying in harbour, and therefore I will never confent to fet out to fea again. *Mich.* 2 *Ann. in B. R. Chetley* v. *Wood*, there the recognizance was defcribed as taken in court, and upon *nul tiel record*, it appeared to have been taken at juftice *Neville*'s chamber, and by him delivered into court; and it was adjudged that the Salk. 564, 659.

plaintiff

plaintiff had failed of his record: and yet in as much as the recognizance took its effect from the inrolment, it might not be improper in a legal sense to say it was taken in court; but because the fact was otherwise, the court held them to describe it according to the fact, and not according to the operation of law.

I have now done with what I had to offer in relation to the form of this writ, and shall therefore in the next place proceed to shew, that it is defective in point of foundation; that it has issued without lawful warrant, without any foundation at all. 1. In respect of a defect in the process by which the principal was brought into court, and upon which it appears the recognizance was taken. 2. In regard the recovery against the principal, upon which this *scire facias* is grounded, was in another action than that wherein we were bail. 3. Because the plaintiffs did not declare within two terms after appearance, according to the course of the court. And 4. Because the original cause was never regularly continued in court.

1. I shall endeavour to shew, that the process by which the principal was brought into court, and upon which the *capias* issued, and the recognizance was taken, is a naughty process; and that, because two different actions are joined in it, debt and trespass; it is *de placito transgressionis acetiam de placito debiti*; which cannot be joined together, for the process to bring in the party is different, in debt by summons, and in trespass by attachment. The one is founded upon a privity of contract, created by the party or the law, and survives against the executor; whereas the other is founded upon a tort, and dies with the person. Besides, the same plea will not answer both, and for that reason it has been held, that *assumpsit* and trover cannot be joined. 1 *Ven.* 366. *Salk.* 10. 1 *Sid.* 244.

If therefore the original, which is the ground of all, is faulty; it follows, that whatever stands upon that foundation must fall with it. But the recognizance derives its obligation from thence; and therefore can have no force, when that is removed.

2. But if the court should be of opinion, notwithstanding this exception, that the principal was well brought into court, and the recognizance well taken; yet I must submit in the second place, whether it does not appear, that the judgment upon which this writ is grounded, was in another action than that to which the bail was given, which was in a plea of trespass with an *acetiam de placito debiti*, whereas the judgment is in an action of debt upon a bond, on the recovery in which action it is admitted by this record, that the *scire facias* is grounded. I am sensible it would be mispending time,

time, for me who am counsel only for the bail, to go into a long argument to prove, that the court of *C. B.* cannot upon an original in one species of action take any cognizance of an action of another kind against the principal: that court has no jurisdiction to hold plea in any case, but upon the King's original writ issued out of Chancery, except in the case of persons having the privilege of that court, which is not pretended in this cause. The original is the commission to the court to hold plea between the parties in the particular cause described in it, but gives no jurisdiction to proceed in any other cause though between the same parties. But I do not apprehend, how the determination of that question can have any influence in this case, since whatever effect it may have as to the principal, yet it can never reach the bail, so as to subject them in any other action than that wherein they were bound; so that I need only prove these to be different actions, which cannot be taken to he the same. And I apprehend, the thing proves itself, for the court will never intend, that this action of debt, wherein the defendant appears to be brought in by summons, can be grounded upon, or receive any sanction from an original, wherein debt and trespass are both joined. Those proceedings must be taken to have another foundation, *viz.* an original in debt, and not to be grounded on one which will not warrant the judgment, according to the case of *Chapman* v. *Barnardiston*, where an original in trespass was held not to warrant a declaration in trover. Lill. Ent. 221. So in 2 *Ven.* 153. in trespass the writ was recited to be *quare clausum fregit et herbam ibidem crescentem conculcavit et consumpsit*, but the declaration had omitted the *clausum fregit*: (and so has the declaration in our case) and for this fault the judgment was arrested after a verdict. So is *Cro. El.* 329, 185. I do not cite these cases (as the immediate tendency of them is) to prove that the declaration shall be held ill, because it does not tally with the recital of the writ, for I am sensible the modern resolutions are, that in order to overthrow the proceedings, they must be compared with the original itself upon a writ of error: but the use I would make of them is, to shew, that if the writ and the declaration do so vary, that will be cause to reverse the judgment. And from hence I presume an original in debt and trespass shall never be taken as the warrant for proceeding in debt only, since the only effect of such a presumption will be, to overthrow those proceedings, which it was introduced to support.

But further, we may safely lay all this aside, and there is no occasion to make use of intendments in this case; since it manifestly appears, that these are different actions; for by the record of the recognizance the principal comes into court, and is let out upon bail in *Hilary* term; but the action wherein the recovery is, appears to be of *Trinity* term, for the

the *placita* is of that *term*, and in that term it is recorded, that the principal *summonitus fuit* to anſwer the plaintiffs; ſo that it is abſurd to ſay, the recognizance of *Hilary* term ſhould extend to an action commenced two terms after, *viz.* in *Trinity* term.

If therefore theſe are taken to be diſtinct actions, it neceſſarily follows, that the defendants by becoming bail in one, made no undertaking for the other; and though they would be liable to any recovery in the action to which they were bail, yet they were not anſwerable in any action which muſt proceed upon ſome other foundation; and it is already admitted upon this record, that the judgment with which they are charged, was in this collateral action.

But even admitting, that as to the principal this declaration in debt was well delivered as a declaration by the by, (though that cannot be after the term wherein bail is filed), yet what we inſiſt upon is, that as to us, who are the bail, the plaintiff is confined to declare according to the proceſs; for though there are two different actions joined in it, yet both together make but one *loquela*, which cannot be ſplit: It muſt be a recovery *in iſta actione* to charge the bail. And therefore where the plaintiff has declared for more than in the proceſs, that declaration has been taken to be one delivered by the by. 3 *Keb.* 16. *Mich.* 3 *Ann.* *Bovey* v. *Wheeler*, and *Salk.* 102. And there is great reaſon why the plaintiff ſhould not be allowed to vary in the leaſt as to the bail; for I would for argument ſake ſuppoſe, that when the defendant comes into court, and finds the plaintiff has done wrong in joining debt and treſpaſs together in the ſame original; thereupon he applies to his friends, and ſhews them the defect, how it is impoſſible the plaintiff can ever ſucceed in that action; and upon that account he procures them to be his bail, who would otherwiſe have refuſed to ſtand for him in a proper action: I muſt ſubmit it, whether it would not be a hardſhip to let the plaintiff charge the bail by delivering a declaration in debt only, when perhaps he ſet out wrong at the beginning with no other view but by that means to get good bail to his action. In *Noy.* 52. the recognizance was, that the principal ſhould upon eight days warning appear to an action to be brought for ſuch a debt, or they (the bail) to pay the money: the breach was laid in not paying ſo much recovered againſt the principal without ſhewing it to be an action wherein he had eight days warning: and for this fault the court held it ill; and *Popham* who gave the rule ſaid, that as to the plaintiff and defendant a voluntary appearance without eight days warning ſhould bind for the defendant had ſubmitted to it, *et volenti non fit injuria* but yet they could not by any agreement among themſelves ſubject the bail in any other method of proceeding than was mentioned

mentioned in the obligatory instrument; so that a voluntary appearance should not bind them who became only answerable for a compulsory one.

3. But if the court should be of opinion, that the recognizance was well taken as to that action wherein the principal is condemned; yet I take it, that the bail are discharged, because the plaintiffs did not declare within two terms after appearance, according to the course of the court, and as the 13 *Car.* 2. *c.* 2. requires. This is the fact which is admitted to us, and it will be no answer to say, that though the defendant might have refused the declaration, and signed a *non pros*, yet if he accepts it, all will be well enough; because his acceptance, which is an estoppel to himself, can never have that effect against us, who are his bail, for the same reason that the act of the bail is no estoppel to him, according to the case of *Needham* v. *Desvairre* in this court, *Trin.* 1 *Geo. rot.* 399. There the defendant pleaded misnomer in abatement, and the plaintiff replied by way of estoppel, that he had put in bail by the name in the declaration; but the court held, that estoppels arise against a man by his own act, whereas this was the act of the bail. So is *Salk.* 3. and the case I cited before out of *Yelverton*, where a voluntary appearance was held to bind the party, but not the bail.

4. The last branch of my exception to the foundation of this *scire facias* is a discontinuance. For the appearance was in *Hilary* term, since which that action has never been prosecuted, as appears by the return of the *certiorari*, so that as to that action the principal and bail were all out of court, and that cause never regularly continued in court. It must be observed, that this objection in the manner I now make it, must take its rise from an opinion, that the proceedings in *Trinity* term have no connexion with, or dependance upon those of *Hilary* term. I would now consider it in another view, by supposing them to be in the same action, so as to put it both ways, either they were, or they were not; if they were, even then there is a discontinuance between *Hilary* and *Trinity* term. If they were not, then the first cause has never been prosecuted; and as to the second, the bail are not liable in that collateral action: So that taking it either way, it will appear, this *scire facias* has issued without a proper foundation.

To recapitulate the substance of what I have offered. First, we say the principal was never regularly in court, and consequently the recognizance was void. But if he was well brought into court, and the recognizance well taken; yet it will not subject the bail to that action wherein the plaintiffs have recovered. And if it will extend so far, yet it appears, the declaration

claration was not delivered in time, nor that caufe ever regularly continued in court. But if the court fhould be of opinion, this writ is good in point of foundation, yet then we fay it is defective in point of form. The breach is not well affigned, for the reafons I before mentioned. And laftly, though none of thefe points fhould be with us, yet the variances are fatal. And therefore I pray, the award of execution may be reverfed.

Reeve contra. As to the exception to the breach; we have affigned it in the words of the condition, which are, that he fhall render himfelf *in executione judicii.* And though I muft admit the inftances put, where this condition may be performed by a render which may not be in execution of the judgment; yet no cafe can be fhewn, where the plaintiff is obliged to affign the breach fo large as to exclude all the different ways which may be conftrued a performance within the intent, though not within the letter. In fuch a cafe the party muft come and excufe himfelf, and the law, in favour of him who perhaps has complied as far as was in his power, will allow that excufe. A condition to re-enfeoff is performed by leafe and releafe; but yet it was never alleged, that the party did not make a releafe, but only that he did not re-infeoff; and if he did make a releafe, that muft be fhewn on the other fide. The precedents are as this writ is. *Co. Ent.* 616. *Officina Br.* 277, 297.

As to the variances, I fhall not enter into any debate whether they are material or not; but what I rely upon is, that they ought to have demanded *oyer* and taken advantage below. Now it is too late; for the recognizance is not properly before the court, and they ought not to have brought it up. And as to what is faid as to the effect of *in nullo eft erratum,* I take it in this place to be a demurrer to this part, which is immaterially affigned. I believe a deed or a bond was never fent for up by a *certiorari* in order to affign variances between them and the declaration, but the proper way to have advantage of thofe variances is to pray *oyer.* This recognizance is in the fame reafon with the bond or the deed, for it is the fpecialty upon which the action is grounded.

As to the other objections, which go to the judgment in the original action: The anfwer I give them is, that thefe defendants cannot affign that for error, for the bail can affign no matter which lies properly in the mouth of the principal: they alone, or by joining with the principal, cannot have error of that judgment. They cannot affign that no *capias* iffued againft the principal. 1 *Ven.* 38. And this anfwer will ferve for the objection, that the declaration was not delivered in time; for they are fo far from having a power to affign that for error, that

hat in 2 *Ven.* 143. it was held, they could not so much as plead t to the *scire facias*. And every body knows, that even matter which is pleadable to the *scire facias*, as a release, cannot be aken advantage of after judgment in *scire facias*, no not by *udita querela*. *F.N.B.* 104. *i.*

Strange replied. Our pleading over can never cure a defect in heir assigning the breach. In 1 *Sid.* 184. in trespass the plainiff had not alleged a possession, and it was held, Not guilty id not cure it. So in *Butts*'s case, 7 *Co.* it is said, pleading ver shall in some cases help a defect in point of form, but in no ase a defect in point of substance. This case of a recognizance liffers from that of a bond, one is a matter of record, and the other *in pais*, and it may as well be brought up as the original s. But whether it was proper to send for it or not, is not now the question, since they have admitted the fact to be as we have alleged it, and then put it in judgment, whether upon that state of the case it be error in point of law or not. It is as insufficient to assign the breach in the words, as it is to plead performance, which may be ill. *Lat.* 16. The covenant was to deliver all his money, and held not sufficient to plead he had delivered all. The general answer, that the bail shall not impeach the judgment against the principal, will not go to my second objection; for there I do not dispute the validity of the proceedings as between the parties, but only insist they are not binding as to the bail. As in the case in *Yelverton* the bail did not overthrow the judgment for want of eight days warning, but only made use of that objection to excuse themselves, without impeaching the proceedings *quoad* the principal.

C. J. Some of the exceptions would hold, if the party did not come too late; and others, if they came out of the mouth of the principal. But as they lie under both those disadvantages, in coming too late, and from an improper person; I think they can have no weight in this case. The objection to the breach strikes at the recognizance itself, which is indeed but oddly penned. It should not have been so strait, for courts of justice ought to take such as will answer the effect of the plaintiff's demand. The effect will be answered by a render, tho' not *in executione judicii*, provided the party be liable to be so.

The others inclined to affirm. But it was put off to another day, when Serjeant *Branthwayte*, *pro quer' in errore*, argued, that the breach is not well assigned, because they charge us with not doing an act, which can only be the act of the plaintiff in the action (*i. e.*) the having him in execution of the judgment. For all we can do, is to surrender him, so as the other may have him in execution; but to surrender him in execution is

is not in our power. I agree it is a general rule, that the breach may be assigned in the words of the condition; but it is with this exception, which goes to our case, that where the natural performance of that condition is what the words themselves do not import, there you must leave the words, and go to that which amounts to a performance within the intent of the condition. A pleader is to go according to the operation of law and not the words of a deed. The grant of one jointenant to another must be pleaded as a release. 2 *Saund.* 97. As to the precedents, they were as much in favour of the case of *Chetley* v. *Wood* in *Salk.* 659. as they are in this case, but yet they had no influence upon the court, because they said they were against law.

As to the variances, they were so fully prest upon the former argument, that I shall not meddle with them; nor indeed is there any occasion, for I do not find it is so much as pretended that they are any ways to be solved. But the only thing I shall apply myself to is, to prove that we are not too late to have advantage of them, which was objected to us. I agree no variance can be assigned between the bond and the declaration, upon a writ of error; and the reason is, because in judgment of law the bond which was once in court is delivered out again to the party at the end of the term. But that reason has no place in the case of a record, which always remains in court. The court sends to inferior courts for their records, and will adjudge upon them, though the party might have had the same advantage below. A man below may have *oyer* of an original upon which the *scire facias* is built. And for the point, that he was not too late, he cited *Yelv.* 218. *Hob.* 4. 2 *Cro.* 331.

Reeve contra. After a *scire feci* returned, the party cannot have advantage of what might have been pleaded. *Salk.* 262, 26[illegible]. There is no difference between a record and a matter *in pais* where it is not part of the same record, as this recognizance is not. 11 *H.* 4. 47. *b.* 1 *Roll. Abr.* 760. The defendants might have had a writ of error *tam in redditione judicii quam in adjudicatione executionis*; and if upon a common writ of error the same advantage might be had, what occasion was there to provide a special one? And this differs widely from the case of an original, for that is only part of the process: But this is like a note or bond, the ground and cause of the action.

C. J. At present this recognizance is no part of the record. The defendant, by praying *oyer*, might have made it so; and if the court below had denied *oyer* (which by the way they did) he would have had the same advantage on a bill of exception

2 I

I am ſorry thoſe who were concerned below had not the courage to do it, for by this means we are now to affirm a judgment, which, if all the parts of it were properly before us, we ſhould be bound to reverſe, and by this artifice the juſtice of this court is eluded. *Powys* J. *accord'*.

Eyre J. In *Trevivian* v. *Lawrence* (which I was counſel in) the judgment on which the *ſcire facias* was brought, was really of another term than the recital mentioned; and the court held, we could have no advantage of it after a *ſcire feci*.

Adjournatur, to look into the caſe in *Yelv*. And the laſt day of the term the Chief Juſtice ſaid, they had peruſed the record, which is *Trin*. 9 *Jac*. 1. *rot*. 305. and nothing is entered there, but the award of execution, with a mark in the margin, that a writ of error was allowed; and whether the judgment was fetched up by a *certiorari*, or by a ſpecial writ of error, does not appear in the report (but they inclined it was by the latter) ſo that caſe was of ſmall authority. The judgment of *C. B.* was affirmed.

Michaelmas Term

6 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Justice.*
Sir Littleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Justices.*
Sir John Fortescue Aland, *Knt.*
Nicholas Lechmere, *Esq; Attorney General.*
Sir William Thomson, *Knt. Solicitor General.*

Memorandum; The Lord Ch. J. *Pratt* was absent all this term, being ill of an ague and fever.

Leighton *versus* Leighton.

Officer examined as to condition, but not substance of records.

WEARG moved, that the keeper of records and fines in *com' Monmouth* might attend the trial at bar with some of the original records, to answer an objection, that had been made upon a former trial, that all the records were worn out and obliterated. *Sed per curiam*, We never do it. You may have a rule for copies. And though the officer cannot be examined as to the matter of a record, yet he may give evidence of the condition of them in general, without producing them, and that will answer your purpose as well.

Hassel

Haſſel's caſe.

FAZAKERLEY moved for a *mandamus* to be directed to the juſtices of peace of the county of *Cheſter*, commanding them to make a rate, to reimburſe one *Haſſel* the money he had expended as ſurveyor of the highways. And it was granted. *Mandamus* to reimburſe ſurveyor of highways.

Aſplin *and* Gray.

PER *curiam*, If the declaration be delivered ſo early in term, that the defendant has eight days in that term, he cannot move to charge the *venue* the next term. Practice, *venue*.

Harvey *and* Porter.

PER *curiam*, If on an old iſſue notice of trial be given before the firſt day in full term, it is ſufficient; and it need not be given before the eſſoin day. What is a term's notice of trial.

Between the Pariſhes of Ratcliffe Culy *and* Exall in Civit' Coventry.

UPON an order for removal of a widow and her two children from *Exall* to *Ratcliffe Culy*, it appeared, that ſome time ſince one *A. B.* was hired and ſerved for a year in the pariſh of *R. C.* and gained no other ſettlement before his death, therefore the juſtices adjudge the wife and her children to be ſettled in *R. C.* and ſend them thither as to the ſettlement of the huſband. An order to common intent is good. Seſſ. Caſ. 145.

Reeve moved to quaſh the order, becauſe a married man gains no ſettlement by any hiring or ſervice; and likewiſe becauſe the children are called *her* children and not *his*. *Sed per curiam*, We never make intendments to deſtroy an order, and it does not appear he was married at the time of the hiring, and if he was married during the ſervice, that will not prevent his ſettlement. And as to the children, we muſt intend them to be *his* by *her*, till the contrary appears; and that they are ſo is implicitly averred in the adjudication of the childrens being ſettled with him; for that they could not be, if they were her children by a former huſband, ſo we muſt take them to be his. Order confirmed.

Palgrave *versus* Windham.

Construction of 8 Ann. c. 14. Lill. Ent. 46. Fortesc. Rep. 359, 372. 9 Vin. Abr. 157. pl. 1.

CASE by the plaintiff as administrator of *J. S.* against the defendant as bailiff of the liberty of the duchy of *Lancaster*, for executing a *fieri facias*, and removing the goods off the premisses before the landlord was paid his year's rent pursuant to the statute 8 *An. c.* 14. The general issue pleaded, verdict and judgment *pro quer'*, a writ of error brought, and the general errors assigned.

Yorke pro quer' in errore, made three points: 1. Whether upon this statute any action lies against the officer. 2. Admitting it does, whether in this case the plaintiff has disclosed sufficient matter to maintain an action. And 3. Whether it will lie for an administrator.

1. The first point depends upon the words of the statute, which are, "That no goods shall be liable to be taken by virtue of any execution, unless the party, at whose suit the execution is sued out, shall, before the removal of such goods from off the premisses, pay to the landlord or his bailiff one year's rent (if due), and the sheriff or other officer is impowered and required to levy and pay the plaintiff as well the money so paid for rent, as the execution money."

Upon this it is plain, that the plaintiff in the action, and not the officer, is the person who is to be accountable to the landlord; and if he does not pay the rent, the landlord will have his remedy against him. But what is all this to the officer? He is to execute the King's writ in the ordinary manner, with this only difference, that if the plaintiff pays the rent, then he must go farther, and levy that as well as the execution money; but if it be not paid (as in this case it appears it was not) then the payment being in the nature of a condition precedent, the officer was not obliged to go out of his way, and consequently there were no *laches* whereon to found an action.

2. But if an action will lie against the officer, yet I apprehend the plaintiff has not disclosed sufficient matter to maintain one, no, not even to have obliged the plaintiff in the action, to pay the rent; for here is no notice or demand alleged, and as this is a matter which lies only in the knowledge of the landlord, he ought to do the first act, by giving notice 1.*Roll. Abr.* 463. *pl.* 16. *Hob.* 51. *Alleyn* 24. 1 *Bulstr.* 12 In a *quantum meruit*, you always aver notice.

It will be ſaid, that there is notice to the officer, but I take that to be as none, for no body will ſay the officer was bound to pay the money himſelf; and as to the verdict, it is true, that will help what is alleged, but can never add any new fact not mentioned in the declaration. *Salk.* 364.

3. This action lies not for an adminiſtrator. For the *git* of this action is either the non-payment of the rent, or the tort in removing the goods. If the firſt, then I ſay the officer is not bound to pay the money. If the ſecond, then this being a perſonal tort, an adminiſtrator can maintain no action for it. The inteſtate had no particular intereſt in the goods (as the plaintiff in the execution after payment of the rent would have) but this is an action ariſing merely *ex delicto*. At common law, before the ſtatute *de bonis aſportatis in vita teſtatoris*, it is certain an adminiſtrator could have no ſuch action; and I take it, that ſtatute has never yet been extended ſo far as this caſe. In the caſes of ejectment, ward, and *quare impedit*, there was an intereſt veſted before the death of the teſtator, of which there is none in this caſe.

Brantbwayte Serjeant *contra*. The miſchief intended to be remedied by this ſtatute was, the fraud which tenants committed, in ſetting up a ſham execution to defeat the landlord of his rent; and therefore it ought to have a liberal conſtruction. The words are prohibitory, that the goods ſhall not be removed; and therefore as the officer had notice, he ſhould have ſtopped his hand till the money was paid, and not have removed the goods, to evade the ſtatute. And it would have been a good return, for him to ſay, that he had ſeized the goods, but could not proceed to expoſe them to ſale, for that the landlord had demanded a year's rent purſuant to this ſtatute, which the plaintiff was not there ready to pay.

As to the want of alleging a demand upon the plaintiff in the action, that is not the *git* of this ſuit, it is the tort in removing the goods; and there being notice to the officer, his proceeding after is a wrong to us, for which he is anſwerable. But ſurely after a verdict, every thing neceſſary to make this an offence muſt be ſuppoſed to have been proved.

As to our ſuing as adminiſtrator, there are caſes ſtronger than this. The difference is in actions *by* and *againſt* an adminiſtrator. This is not a wrong to the perſon, but to the eſtate of the inteſtate. Upon the ſtatute of *E.* 6. an action lies *by* but not *againſt* an executor, for not ſetting out of tithes. 1 *Sid.* 88, 407. 1 *Ven.* 30. In 4 *Mod.* 403. an executor maintained an action for a falſe return. Here the inteſtate had an intereſt in 2 & 3 E.6. c.13.

 the

the goods; they were a pledge for his rent, but are now lost. This was over-ruled in *C. B.*

Yorke replied. In the case of tithes there is an interest vested, and that in 4 *Mod.* was after execution, where the sheriff having the money in his hands, was liable to an action of debt. *Cro. Car.* 539. But *Jones* 173. the better opinion is, that upon mesne process such an action is not maintainable. In that case too the debt was absolutely lost, but here the landlord or his administrator may still sue the tenant for his rent.

Powys J. held the action lay against the officer for the tort, and that though notice is requisite, yet the want of alleging it is helped by the verdict. And that the removal of the goods was a wrong to the estate of the intestate, for which his administrator might maintain an action. *Et per Eyre* J. As the officer had notice, that is enough to subject him, though it does not amount to a demand of the money of the plaintiff in the execution; which, though the statute is silent, yet upon the reason of the thing I take to be necessary. Executors and administrators may sue for an escape, and here the intestate had an interest, for which his administrator may bring an action. To which *Fortescue* J. agreed. And the judgment of *C. B.* was affirmed.

Fortesc. Rep. 372. S. P.

N. B. I was counsel in this cause as an assistant to a Serjeant in *C. B.* and took another exception, that there was no such statute as the plaintiff had declared upon, for he sets out with one made at the Parliament begun and holden 8 *July* 8 *Ann.* when it was in 7th of that Queen. But the court held, that the saying afterwards *contra formam statuti in eo casu edit' et provis'* had set the matter at large: And then it being a publick act, they were bound to take notice of it. And the plaintiff was not prejudiced by the mistake.

Wegersloffe *and* Keene.

There may be a partial acceptance of a bill of exchange.

ACTION upon the case upon the custom of merchants brought by the person to whom a foreign bill of exchange is made payable against the acceptor. And the declaration sets forth, that one *James Collet*, being a merchant residing at *Christiania* in *Norway*, according to the custom of merchants drew his first bill of exchange upon the defendant, requesting him to pay the plaintiff such first bill (his second not being paid) of 127 *l.* 18 *s.* 4 *d.* which bill was afterwards, *viz.* 9 *December* 1717, shewn to the defendant, who accepted to pay 100 *l.* part thereof, upon the 8th day of *Februury* following,

by virtue whereof he became chargeable, *et in consideratione inde eisdem die et anno ultimo supradictis super se assumpsit*, to pay the same on the 8th day of *February tunc prox' sequentem*, which he has not done according to his undertaking. There is likewise a count for monies had and received, and an *insimul computassent*. The defendant as to those two counts pleads *non assumpsit*, and as to the count upon the bill, he pleads, that the said *James Collet* drew another bill for 100*l.* only, wherein he countermands the payment of the odd 27*l.* 18*s.* 4*d.* by virtue whereof the defendant paid the 100*l.* in satisfaction of the first bill, and the plaintiff accordingly received it in satisfaction. The plaintiff, *protestando* that the defendant did not pay it in satisfaction, for plea saith, that he never received it in satisfaction. And to this replication the defendant demurs.

Strange pro defendente. I shall not trouble the court with an exception which has formerly been taken to these replications, that the payment in satisfaction being admitted, the traverse of the acceptance is immaterial; for I am sensible, it has been adjudged to be well enough in the case of *Young* v. *Ruddle*, *Salk.* 627. and of *Hawkshaw* v. *Rawlings* in this court, *Hil.* 3d of his present Majesty, upon this ground, that there can be no payment in satisfaction, without an acceptance in satisfaction; and therefore a traverse of the acceptance is an argumentative denial of the payment; for if the plaintiff did not accept it in satisfaction, the consequence of that is, that it was not paid in satisfaction.

Laying therefore the plea and replication aside, I shall take up the case as it stands upon the declaration, and upon that offer some things distinctly, both as to the matter, and as to the manner of it.

As to the matter of it, the case is no more than this; the person to whom a foreign bill of exchange is made payable, brings his action against the drawee, upon a partial acceptance for so much of it as he undertook to pay, and counts upon the custom of merchants.

The single point which will arise upon this case is, whether a partial acceptance be good or not within the custom of merchants. And I shall endeavour to prove, that this acceptance is a void acceptance, and consequently the plaintiff has no cause of action.

That I may not be misunderstood when I call this a void acceptance, I would premise, that I do not mean, it is so absolutely void as to exclude any remedy against the acceptor, for I must admit, that this acceptance will create a contract between

the parties, upon which an action upon the cafe would have laid. But what I fhall infift upon is, that this is a void acceptance within the cuftom of merchants, upon which the plaintiff has founded his cafe; and if it be void within the cuftom of merchants, then, whatever effect it would have as a private contract between the parties, will be a matter foreign to the prefent queftion, inafmuch as the plaintiff has not relied on it as fuch, but has brought his action upon the cuftom.

I have inquired into the practice of merchants in this cafe, but have not been able to get any certain account of this matter. The true reafon of which I apprehend to be, that it is a cafe which feldom or never happens amongft merchants, for they honour one another's bills, though there are no effects of the drawer's in their hands; and they would efteem it the greateft blemifh that could be caft upon them, if their correfpondent fhould once refufe to anfwer their bills any further than they had effects in his hands.

What account I have received, I fhall fubmit to the court. Some are of opinion, that an acceptance for part is an acceptance for the whole, inafmuch as it deprives the party of the benefit of protefting, and fo reforting back to the drawer. But I apprehend there is no reafon at all for this. To fay that becaufe commonly a man does honour another's bill beyond what effects he has in his hands, that therefore he muft do it, is a ftrange conclufion. For fuppofe he has but 20*l.* of the drawer's in his hands, and is bound to anfwer a bill for fo much it would be highly unreafonable, that in cafe the other fhoul draw for 10,000*l.* this man muft either pay the whole, or fubject himfelf to an action for non-performance of the condition.

But if this notion fhould prevail, that an acceptance for part is an acceptance for the whole, yet as on the one hand it charges the acceptor with the entire fum, fo on the other hand it difcharges him of this action. For then there can be no colour to fplit the demand into two actions, but the plaintiff, in declaring for part, ought to fhew, that the reft is fatisfied. *Salk.* 65.

Others are of opinion, that the party ought not to have taken this acceptance, but protefted the bill as to the whole, and fent for another to the value of what the drawee would anfwer. This likewife makes for the acceptor the defendant.

I am informed indeed, there is one gentleman does attend to fay, that this matter has happened in his own experience; but he by what I find is alone in that opinion, and perhaps may not have confidered the confequences of it.

As

As there is this diverfity of opinions upon a matter which feldom or never comes in practice, I fhall take it upon the reafon of the thing, with a view likewife to the many inconveniencies which will follow as a confequence of eftablifhing this partial acceptance.

The better to come at this, it may not be improper to ftate the method of tranfacting thefe affairs. When the party to whom a bill of exchange is made payable receives it, he immediately applies to the drawee to get his acceptance: if he accepts it, nothing farther is done 'till the day of payment, and then if it be paid the matter is at an end. But if the drawee will not accept it, then the party is to proteft the bill, and fend back the proteft by the next poft. When the time of payment comes, he tenders the bill again, and then the drawee may either pay it or refufe it: if he refufes it, then there is fecond proteft for non-payment, and the bill itfelf is returned. And fo it is if he accepts it, and afterwards refufes to pay it. From all this I would infer, that there can be no partial proteft for non-acceptance, which, as I am informed, is a proteft not in the memory of any but one of the notaries publick. The words of all protefts are, *I exhibited the original bill to the perfon to whom directed, and demanded his acceptance thereof.* Now an acceptance of part is not an acceptance *thereof*, no more than payment of part is a payment of the whole. There is a book which goes by the name of *Advice concerning bills of exchange*, and is efteemed amongft thofe who are moft converfant in thefe affairs. And in *fol.* 33. of that book it is faid, that nothing but an acceptance to pay *fecundum tenorem billae* can deprive the party of the benefit of a proteft. And in *fol.* 16. of the fame book he puts the cafe of a bill drawn on *A.* and *B.* who are not joint traders, and an acceptance by one only: this fays he goes for nothing, and the party muft proteft the bill as in cafe of no acceptance. Thefe are the words of the book: and by putting the cafe of two who are not joint traders, I fhould apprehend he means, that each being charged with a moiety, the acceptance of one is but an acceptance to pay a moiety, which is but a partial acceptance, and therefore void: and this is explained by the cafe of *Pinkney* v. *Hall*, *Salk.* 126. where one joint trader accepted a bill, and it was held to be the acceptance of both, becaufe both were equally liable to pay the whole. And to this purpofe likewife is *Molloy de Jure Maritimo*, in the chapter concerning bills of exchange.

If there can be no proteft for non-acceptance of part, I would confider how the cafe would ftand in regard to allowing this partial acceptance: the natural and plain confequence of that will be, to put it in the power of the drawee to defeat the other of the benefit of protefting a bill for 10,000*l.* by his acceptance to pay one penny only; for this I would fubmit, that

that if the party *may* take ſuch an acceptance, he *muſt* take it: if it will be good, he cannot refuſe it, for it is not at his election to charge the drawer but upon the other's default the drawee is the perſon he muſt firſt reſort to, and if he refuſes, then, and not till then, is there a proper remedy againſt the drawer; and therefore in the action againſt the drawer the plaintiff muſt ſhew a proteſt, which is an endeavour to receive the money of the drawee. *Salk.* 131.

But even admitting there may be a partial proteſt for non-acceptance, yet the inconveniencies which will follow of courſe are ſo great, that I hope it ſhall never be eſtabliſhed by the judgment of the court.

It would be endleſs to put caſes where it has been held, that rent-charges and the like cannot be apportioned; and therefore I ſhall rely entirely upon the reaſon of the thing, that in this caſe the contract between the drawer and the perſon to whom the bill is payable is entire and not diviſible. By this contract the drawer (and conſequently the indorſer) ſubjects himſelf to an action if the money be not paid at the time: but though he becomes liable to one action, yet there is no reaſon, that by tranſactions between the party to whom the bill is payable, and the drawee, to which he is not privy, this contract ſhould be branched out into ſeveral actions, which will unavoidably be the caſe of every partial acceptance: for I do not apprehend how this can be reduced to one action by refuſing this partial acceptance, and proteſting for the whole; becauſe (as I obſerved before) if the party *may* take it, he *muſt* take it, and can charge the drawer no farther than there is a default in the drawee.

As therefore two actions are the feweſt he can be charged with, I would beg leave to inſtance how he may be charged with a great many. The acceptor will charge him as far as his undertaking: then another for the honour of the drawer (as is uſual amongſt merchants) may undertake for another part, and by the ſame reaſon a third, and a fourth, and no body can ſay where it ſhall ſtop: ſo many different perſons may accept for ſo many different pence, and every one of theſe has his diſtinct remedy againſt the drawer.

This is too great an inconvenience to be got over; and it is ſuch an inconvenience (I mean the multiplicity of ſuits) as the common law has always endeavoured to meet with. In the caſe of *Hawkins* v. *Cardee*, *Salk*, 65. it was held, that the indorſee of part could have no action, becauſe, ſays my lord chief juſtice *Holt*, the drawer having only ſubjected himſelf to one action, it cannot be divided ſo as to ſubject him to two. If the grantee of a rent-charge levies a fine of part, the conuſee cannot compel an attornment, for that would be to give two

two actions againſt the tenant. So if a feoffment were made to a man and his heirs with warranty, and he makes a feoffment to two, the warranty is gone. If two take lands jointly with warranty, and one makes a feoffment: the warranty is gone as to him, but remains as to his companion, ſo as he may vouch for a moiety; and at common law if they had made partition, the warranty was loſt. *Co. Litt.* 187. *a.* And all this goes upon that ground, that it being *res inter alios acta*, it ſhall not turn to the prejudice of a third perſon. But this partial acceptance is a matter tranſacted between mere ſtrangers; and therefore ſhall not hurt the drawer, who was no party to it. No act of theirs, which would be prejudicial to him, ſhall bind him. But the ſubjecting him to ſeveral actions will be a prejudice; therefore he ſhall not be ſubjected to ſeveral actions.

The great benefit ariſing to the publick from theſe bills is, their being negotiable and paſſing about as well as money; for every body is ſenſible, that without the aſſiſtance of theſe bills our trade could never be carried on for want of ſufficient *ſpecie*; not to mention the trouble and danger in returning money, which is avoided by this expedient. It is this benefit which the publick receives from theſe bills, that has intitled them to all the favour they have received, of which innumerable inſtances might be given. For this reaſon it has been held, that the bare drawing or accepting a bill, makes a merchant for that purpoſe. 1 *Salk.* 125. *Show.* 125. 2 *Ven.* 295. Now if what is contended for on the other ſide ſhould prevail, the publick will be deprived of this great benefit; for no man will take this bill as ſo much money in the way of trade, when he is to reſort to one man for one part, and perhaps ſend out of the kingdom for the other to a place where he has no correſpondent. In the caſe of *Jocelyn* v. *Laſerre*, which was in this court, *Hill.* 11 *Ann. rot.* 214. where the bill was to pay *out of my growing ſubſiſtence*, it was held, that in regard his growing ſubſiſtence might never amount to the ſum drawn for, therefore this was not a bill of exchange within the cuſtom of merchants, for no body would take it upon ſuch a contingency. And the caſes of promiſory notes ſince the ſtatute have gone upon the ſame reaſon. *Smith* v. *Boheme*, *Mich.* 1 *Geo. in B. R.* which was *to pay money or ſurrender a man to priſon*. And the caſe of * *Appleby* v. *Biddle*, *in B. R. Hill.* 3 *G.* which was to pay *ſo much to A. if I do not pay ſo much to B.* and both theſe were held not to be within the ſtatute, upon that only reaſon that they were not negotiable.

Fortesc. Rep. 281.

Ld. Raym. 1396, 1362.

* 8 Mod. 363.

Another inconvenience which naturally occurs upon this occaſion is, that the drawee will inſiſt to have the whole bill delivered up, when he pays but a part only. For, according to the

the authors who treat of this ſubject, he can never charge th drawer, when they come to make up their accounts, with mo than he has vouchers for under the hand of the drawer. I *Lex Mercatoria* 274, it is ſaid, that if the bill be loſt, th drawee cannot juſtify the payment, though he has a letter c advice. And this refutes all the expedients of indorſing par or giving a ſpecial receipt for ſo much, becauſe of neither o thoſe caſes will the drawee have any authority to produce unde the hand of the drawer. If the drawer then refuſes to allow what the other has paid, his only remedy will be to bring hi action; and how he will be able to maintain it upon the cuſtom of merchants I muſt confeſs myſelf at a loſs to find out for he will want the neceſſary evidence to maintain ſuch a action, which is the bill itſelf that was drawn upon him.

If this then will be the caſe, where he pays the money without taking up the bill; I muſt contend that by all the rule of prudence and juſtice he may inſiſt to have the whole bil delivered up to him, when he only pays part of it accordin to his acceptance.

Suppoſing him then in poſſeſſion of the whole bill, I would conſider in what a condition we have left the party to whom it was made payable. He muſt be ſuppoſed to have advanced a conſideration adequate to the whole ſum, and conſequently is in juſtice intitled to his whole money of ſomebody or other. It will be ſaid, that he may get what he can of the drawee, and then go back to the drawer for the reſidue. It is true he may do ſo, and the drawer may be a man of ſo much honour as to pay him every farthing. But what muſt he do when he finds he is miſtaken in his man; when the drawer (inſtead of ordering him the money as he expected) ſhall tell him, No, you have nothing to produce under my hand, and if you have been ſo fooliſh as to deliver up the bill, you muſt take it for your pains. I know of no remedy in this caſe but what would be worſe than the diſeaſe, and therefore the prudenteſt thing he can do will be to ſit down by the loſs.

And this will be ſo far from being a trick in the drawer, that it will be more than what every prudent man will do. For if upon the report of what has been done he ſhould advance the reſidue of the money, yet ſtill there is a bill ſtanding out againſt him for the whole, upon which bill it cannot appear he has paid the money which the drawee had left unpaid. And whether in that caſe he would not afterwards be anſwerable for the whole, may be proper to be conſidered.

I have now done with what I had to offer in maintenance of the negative of the queſtion I propoſed to ſpeak to, and ſhall therefore

therefore proceed to take notice of what was hinted at upon the former argument in behalf of the plaintiff in this cafe.

It was faid that the drawee may (and very often does) accept to pay the money at a different time from what is appointed in the bill. I muft admit he may do fo, but furely that cafe can bear no proportion to this cafe. It is not liable to any of the inconveniencies I mentioned; it is the fame as if the bill had at firft given him a longer time, and it is well known that after acceptance a month or two will break no fquares where the man is good: With this further, that amongft merchants fuch an acceptance is efteemed a general acceptance to pay the money according to the tenour of the bill. Befides, *Molloy* fays, that in fuch a cafe the bill muft be protefted, which cannot be done in our cafe.

It was further urged to be highly reafonable, that the drawee fhould honour the bill as far as he had effects. I admit this to be reafonable, and perhaps it would not have been impoffible for the plaintiff to have declared in fuch a manner, as to have charged the defendant to the amount of his acceptance: But we are here upon the cuftom of merchants, and whatever might be reafonable in cafe of private property, will ceafe to be fo, when it appears to be pregnant of fo many inconveniencies to the publick as I have mentioned. And if the plaintiff has it in his power to frame a cafe wherein he may do himfelf juftice, that makes the argument ftronger againft fuffering him to break in upon the publick convenience for his private benefit. The policy of the law is, rather to let one man fuffer, than to introduce a general inconvenience: But here we are to be led into the greateft inconveniencies, even in a cafe where there is no danger of the parties fuffering in the leaft; for he has a remedy, which ftands clear of all thefe inconveniencies, and there will be no harm in leaving him to that.

It was faid, that if the drawer (who is fuppofed to know what effects he has in the others hands) by drawing for more fubjects himfelf to feveral actions, it is his own fault. The anfwer to this is, that the very drawing for more, deftroys the prefumption that he knew how accounts ftood. But amongft merchants, as I obferved before, that is not the cafe, for they often honour one another's bill, where there are no effects at all.

But even admitting the drawer does not ftand altogether clear of this objection, yet ftill this may be the cafe of one who cannot be fuppofed to know how the accounts ftood between the drawer and the drawee: For it may happen this bill may be indorfed, and then the indorfor is to be charged in the fame manner as

as the drawer. The indorſor will be liable to ſeveral actions though he is no ways privy to any of the tranſactions between the indorſee and the drawee.

Upon breaking the caſe upon the former argument a difference was taken between the caſe of the acceptor and that of any other perſon: that *he* ſhould not come and diſcharge himſelf againſt his own acceptance, whatever the other might have done as to refuſing this partial acceptance. If this was his caſe only, it might be reaſonable to extend this acceptance as far as it will go; but the hardſhip is, that what is law in his caſe, muſt likewiſe be law in the caſe of the drawer and indorſor; ſo that here are two innocent perſons who are to be involved in the ſame common fate; and that is never to be ſuffered, eſpecially when the drawee may be charged in another manner, which will not affect the drawer or the indorſor.

But if this partial acceptance ſhould be thought good within the cuſtom of merchants: yet the plaintiff can never recover in this action, in regard to the manner in which he has declared.

My firſt exception is, that the plaintiff by his own ſhewing has brought his action too ſoon. This is a declaration of laſt *Michaelmas* term, and the acceptance is laid to be the 9th of *December* 1717, to pay upon the 8th of *February* following, in conſideration whereof he did the ſame day and year laſt mentioned, which was the 8th of *February* 1717, promiſe to pay the money on the 8th day of *February tunc proxime ſequen'*. Now there muſt of neceſſity be the intervention of a whole year between the 8th of *February* 1717, and the 8th day of *February* following: and then the caſe is no more, than that the plaintiff complains, that the defendant on the 23d of *October* had not paid him a ſum of money which of his own ſhewing was not to become due till the 8th of *February* following. If it were neceſſary to cite caſes in maintenance of this exception, there are 1 *Sid.* 373. 1 *Ven.* 135.

Another exception is, that the plaintiff has not alleged any requeſt before bringing the action, which he ought to have done; for the merchant who accepts is eaſy to be found, but the party to whom the bill is made payable may only be a traveller to whom the other cannot reſort to pay the money. And this differs from the caſe of a bond, for there it is for the benefit of the obligor to ſave the penalty, ſo there needs no requeſt to him to do an act for his own benefit. It will be ſaid, that the action is a requeſt; but if it be, ſtill it recurs to that queſtion, whether a requeſt at the time of bringing the

action

action is sufficient. And it is plainly not so, for then it is a request to pay the money four months before it became due.

I shall trouble your Lordship with but a word more, and it is this, the bill runs, Pay this my first bill, *my second not being paid*, and therefore I must submit it, whether they ought not to have averred, that the second was unpaid. Indeed in the case of *East* v. *Effington*, *Salk.* 130. it was held well after a verdict, because if the second was paid, the jury could not find *assumpsit* as to the first: he was not to pay the first unless the second was unpaid, so the jury finding him bound to pay the first, that is an argumentative finding the second unpaid. But the court in that case inclined, it would have been ill upon a demurrer.

It will be said, that this should have been shewn for cause of demurrer. But this exception goes to the cause of action itself, and may as well be taken advantage of upon a general demurrer, as the want of setting out an attornment was in the case of *Long* v. *Buckeridge*. *Ante* 106.

The whole, both with relation to the matter and the manner of this declaration, may be reduced to this dilemma: either this partial acceptance is good, or it is not. If it is good, yet the plaintiff has come too soon, without alleging what is necessary to make out his case, and consequently can never recover in this action. If it is not good, that alone will be sufficient to intitle us to judgment for the defendant.

Reeve contra. I am no otherwise prepared to argue this cause, than by acquainting the court, that a gentleman has often attended, to inform you, that it is practicable to protest a bill for non-acceptance of part, and then resort back to the drawer. As to the inconveniencies which are urged, they are as great of our side upon account of death or acts of bankruptcy. The drawee is not prejudiced; and as to the drawer, if part is paid, his debt is so much lessened, which is a benefit to him.

As to the first objection to the declaration, that we have brought our action too soon: it runs, *in prædict. octavum diem Febr. tunc proxime sequentem*; so to support the declaration you will reject *proxime sequentem*, and then it stands as a promise to pay in *February* 1717, and the action is in *October* following.

2. No request was necessary, for upon the acceptance a duty arises, and this is not a collateral promise.

3. If

3. If the defendant had paid the fecond bill, he fhould have pleaded that matter in his difcharge; and as to the cafe of *Eaft* v. *Effington*, that was againft the drawer upon the firft contract, but this is againft the acceptor upon a new contract.

Strange replied. As to *praedict*, it does not make the fentence inconfiftent with *proxime fequentem*; for it is common to call the fame day in a different year, the fame day generally: and here it is no more than that the party promifes on 8 *February* in one year to pay upon the fame day in another year: and where a thing is grammatically right, the court will never reject it, as was held in the cafe of *Wyatt* v. *Aland in B. R. Trin.* 2 *Ann.*

Salk. 324.

They fhould have fhewn the fecond bill unpaid, for it is in the nature of a condition precedent to their having any right to this action. As to the requeft, no debt arifes upon the acceptance, for an *indebitatus affumpfit* will not lie upon a bill of exchange. *Salk.* 125.

Powys J. Either party might have refufed this partial acceptance, and they were at the fame liberty to take it: neither could force the other to it, but if both agree, *volenti non fit injuria*. The drawer trufts all to the difcretion of the perfon to whom he gives the bill, and if that perfon leads him into inconveniencies, who can help it?

Where a bill runs, *Pay my firft my fecond not being paid*, action may be maintained on the firft without averring the other was unpaid.

Eyre J. I think the declaration is well enough; we will reject *proxime fequentem*, and then all is right: there is no difference between the cafe of the drawer and the acceptor, for if he pays either of the bills, the drawer is not liable. Acceptance of one is fo of both, though in fact it amounts to no more than an acceptance to pay the contents of one of them, and payment of one is a difcharge of both: fo that the averment that the money was not paid upon the firft goes to the fecond alfo. I fearched, but could not find the record, of *Eaft* v. *Effington*; and by my notes I find it went off immediately upon the anfwer, that the verdict had cured it. The precedents are as this declaration. *Vidian Ent.* 31, 67.

Fortefcue J. I think there is a difference between the cafe of the drawer and acceptor, for the drawer is bound to pay all, the drawing being an actual promife; but the acceptor is bound to pay but one, and no action can be maintained but upon the very note which he accepts. There is another anfwer to the objection, that the action is brought too foon; and that is, that the plaintiff needed not fet out any promife at all. 10 *W.* 3. *Stalk* v. *Cheefeman*, *Salk.* 128. *Lowther* v. *Conyers*, which was upon

upon a promissory note, and they had left out *super se assumpsit*, and yet it was held well enough, for the law raises a promise. And this is likewise an answer to the want of request. In *Molloy* and the other books there is a whole paragraph about the partial acceptance of a bill of exchange, and they allow it to be good. So judgment was given for the plaintiff.

In count upon an acceptance, an express *assumpsit* need not be laid.

Dominus Rex *versus* Tucker.

YORKE moved to quash the return of a rescous of two persons, because it is only said, that they could not afterwards be found, without saying *nec eorum aliquis*. *Cro. Jac.* 419. 3 *Bulst.* 200. 1 *Roll. Abr.* 802. *Mich.* 11 *Ann.* *Davis* v. *Fuller*, where the return to a *scire facias* against three was, *non sunt inventi* generally, and held ill. 3 *Cro.* 50.

Non sunt inventi is no good return without *nec eorum aliquis*. Fortesc.Rep.362. Barnard. K. B. 26.

Darnall Serjeant *contra*. All the precedents in *Off. Br.* are thus. 2 *Keb.* 341, 436. *Nichil habent.* *Exacti non comparuer'.* *Nulla habent bona.* *Sed per curiam*, The difference lies between the affirmative and the negative. *Et semble* this return is ill. *Sed adjournatur.* And *Pas.* 6 *Geo.* the return quashed.

Ducissa Hamilton *versus* Incledon.

ERROR of a judgment in *C. B.* in an action upon the case upon several promises, verdict *pro quer'*, and general errors assigned.

In misericordia, &c. is sufficient in actions against peers.

Strange pro quer' in errore. A peer (and consequently a peeress) cannot be attached, but should be brought in by summons; whereas this declaration runs, that the dutchess *attachiata fuit ad respondendum.* *Sed per curiam*, Whether that be right or wrong, is not material; for if it be wrong, yet according to the modern resolutions you cannot reverse a judgment by the recital of the writ, but must bring the very process itself before the court.

Recital of a writ not to be argued from.

2. The dutchess is put *in misericordia* generally, which ought not to be; the statute of *magna charta*, *c.* 14. appoints *quod comites et barones non amercientur nisi per pares suos, et non nisi secundum modum delicti*. But though it says *per pares suos*, yet I admit that long usage has vested that power in the Judges of the King's courts, who are to be looked on as *pares quoad hoc*. The amercements of the nobility are now reduced to a certainty; a Duke 10*l.* and an Earl or other Baron 5*l.* And as to what may be said, that here is an &c. which implies an amercement according to law. To that I answer, that then

there is no distinction made between the amercemen Peers and common persons, which Mr. *Selden* in his t of Baronage says ought to be, for his words are, "T "case of amercements of Barons of Parliament upon "suits or other judgments ending *in misericordia*, ther "special course both for the sum and the way of ascert "it, which differs from the amercements of common per And then he goes on and gives you the roll in *Edwar* Second's time, where a writ was directed to the justi *C. B.* that they should not amerce the abbot of *Crowlan quam baro*, for that he held not *per baroniam*. Now ther no need of this, if he might be generally amerced. An Lord *Coke*, 2 *Inst.* 28. says, if a nobleman and a co person join in an action, they shall be severally amerce nobleman at 100*s.* and the common person according t statute. So is *Bro. Amercement* 2. *Sed per curiam*, It i constant way, to say *in misericordia*, &c. which implies thing, and we cannot overturn the precedents. Judgme firmed.

Bacon *versus* Peck.

If there be a *nichil* returned as to the lands, there may be a *ca. sa.* after an *elegit.*

THE plaintiff took out an *elegit*, and by virtue th levied part of the debt upon the goods, and after a returned as to the lands, sues out a *capias ad satisfaciendum* arrests the body of the defendant.

19 H. 6. 4. b. Dy. 162. b. 15 H. 7. 15. 1 Roll. Abr. 601. pl. 4. 2 Inst. 395. 3 Co. 11, 12. F. N. B. 265. b. Hob. 56. 13 H. 4. 1. b. Lancaster *v.* Fielder. 2 R. Raym. 1451. S. P.

It was moved to quash the *capias ad satisfaciendum*, be the plaintiff, by taking out an *elegit*, had waived any execution. And for this all the old cases were cited. the court held the *capias ad satisfaciendum* was regular, for being a *nichil* returned as to the lands, the *elegit* was but i nature of a common *fieri facias*, upon which if part be le the plaintiff may afterwards have a *capias ad satisfacien* The election is not compleat, unless the plaintiff has benefit from the land; for the taking out the writ is no actual election, but only in order to an election; and if be no lands, there is nothing to chuse, and consequentl election.

S

Stibbs *versus* Clough.

Trin. 5 Geo. rot. 368.

EBT upon a bond, conditioned to perform articles, which upon the plea appear to be an agreement, that the tiff shall furnish the defendant with ale and beer to be n his house at such prices, and that he should take it of ody else, but might be at liberty to take any other li- s (malt liquors only excepted): and what should not be for at breaking up the trade, and were undrawn, should ken back. And then the defendant pleads performance. plaintiff replies, that by the same articles it was further d, that what should be drawn should be paid for, and that was such a quantity of liquors unpaid for. *Demurrer inde*; The breach must be as particular as the covenant, and where a deed is pleaded the plaintiff cannot reply new matter in the deed, but must set it out upon *oyer*.

ris pro defendente. By the breach it does not appear, the ors unpaid for were malt liquors; and as other sorts are tioned, the plaintiff should have been more particular, cially in the case of a bond, where he is to subject the de- ant to a penalty.

per curiam, The replication is likewise ill, for the plaintiff only allege new matter in the articles by setting them out n *oyer*. The case of the *African Company* v. *Mason* was a d, conditioned, reciting that the defendant was their re- er at *Bristol*, if therefore he do well and truly account for sums by him received, then the bond to be void: the ch was, that he received so much money, and did not ac- nt for it; and because it appeared by the recital in the dition, to be only about transactions of a particular nature, general assignment of the breach was held ill. So is 2 *Saund*. *Judiciam pro defendente*. Lucas 227. S.C.

Peele *versus* Com' Carliol'.

EBT on bond, conditioned to resign a benefice. And the court refused to let the defendant's counsel argue the dity of such bonds, they having been so often established, n in a court of equity. And also where the condition is eral, and not barely to resign to a particular person. 2 *Chan*. 398. 2 *Keb*. 446. 1 *Sid*. 387. *Hutt*. 111. Bond of resignation good.

Gyse *versus* Ellis.

Where the action is against the original lessee, the breach need not extend to assigns.

COVENANT that the defendant, his heirs and assigns, shall every year during the term plant eight crab stocks, and the breach is, that the defendant such a year neglected to do it.

Wearg objected, that the breach should have been in the disjunctive, that neither he nor his assigns did it. *Plow.* 199. *Cro. El.* 348. *Bridg.* 46. *A.* covenanted, that he, his executors or assigns, would do such an act, and the breach was, that the executor did not do it, without taking notice of the testator, and held ill. And the difference is between doing a thing *to* a man and his assigns, and *by* a man and his assigns.

Probyn contra. The action is against the original lessee, so there can be no assignment intended: we knew nothing of any; if there be one, it lies in their privity, and therefore they should defend themselves by shewing one. The case in *Cro. El.* is not *ad rem*, for there the breach was in the conjunctive instead of the disjunctive, and that was the reason of its being held ill.

Et per curiam. We must intend the estate continues in him till the contrary appears; and therefore the declaration is well enough, being against the lessee himself. *Qui facit per alium facit per se*; and therefore if the assigns have done it, the breach that the lessee himself has not, is false. There is as much necessity to say, an heir did not perform the covenant, when the action is against the ancestor. *Judicium pro quer'.*

Coleman *versus* Earle.

Willielmo for Waltero in the *assumpsit* vitiates not, if there be no *William* named before.

THE plaintiff's name was *Walter*, and on error *Braithwayte* Serjeant objected, that one of the *assumpsits* was laid *praefat' Willielmo*, and the damages are entire.

Reeve contra. There being no *William* mentioned in the record before, it must be rejected as insensible; and then there are other parts of the count, which shew the *assumpsit* could be only to the plaintiff. In *Roe* v. *Gatehouse*, *Hill.* 8 *W.* 3. *Salk.* 663. it was *super se assumpsit*, without saying who, and held well enough. So *Trin.* 2 *Ann. in B. R. Shere* v. *Brown.* The declaration run, that in consideration the plaintiff had delivered goods to the defendant; *super se assumpsit*, to pay for them

with

without saying who promised; and yet this was taken to be good. *Trin.* 5 *Ann.* *Athorp* v. *Gosling*. In an action against a carrier, it was laid, that in consideration the plaintiff had delivered goods to the defendant to carry, *ipse praed'* (the plaintiff instead of the defendant) *super se assumpsit*, and that was resolved to be well enough. *Pasch.* 4 *Ann.* *Assumpsit* by an executor, who declared, that in consideration *the testator* had carried goods, he the defendant promised to pay *quantum praedictus Thomas* (who was the executor) deserved; and though he ought to have said *quantum* the testator deserved, yet the count was adjudged sufficient. If these cases should not be answers, then I rely on 16 & 17 *Car.* 2. which cures the mistake of the plaintiff's or defendant's name, when they are before rightly mentioned in the record.

Sed per curiam: Let us not pray in aid of the statute, when the thing is well enough of itself. So is 1 *Mod.* 42. *Salk.* 24. And therefore the judgment must be affirmed.

Aleberry *versus* Walby. Hil. 5 Geo. rot. 206.

In what actions baron and feme may join.

ERROR of a judgment *in C. B.* in an action of covenant brought upon a lease for years; and the breach assigned in non-payment of rent: judgment by default, *inquiratur de dampnis:* general errors, and want of an original, and returned accordingly: another original alleged by defendant of another term, and a *certiorari* prayed, and one returned and set forth; and some little variances; and *in nullo est erratum* pleaded.

Strange pro quer' in errore. This is an action by a man and his wife and a third person, who is tenant in common with the wife, upon a lease at will made during the coverture, of lands which are the inheritance of the wife and that third person, for arrears of rent incurred during the coverture; and therefore the wife cannot join in such an action, for 1 *Sid.* 224. she shall join in no action, but what will survive to her, or her administrator after the death of the husband: now the husband is fully intitled to the rent incurred during the coverture, and if she dies, he, and not her administrator, shall have those arrears. *Co. Litt.* 351. *a.* 1 *Roll. Abr.* 345. *H.* 1.

As this is but a lease at will, it is not within the statute 32 *H.* 8. *c.* 28. which requires, that the wife should be made a party to leases of her land, and the reservation be to her and her heirs; for that statute extends only to leases for life or years. And though the reservation here be to her as well as to the rest, yet that will make no difference; for during his life, it is in the

 eye

eye of the law a reservation only to the husband; and they ar not to declare upon it according to the fact, but according to th operation of law. If one jointenant pleads, that the other *con cessit* to him, it is ill; for it should have been pleaded as a re lease, that being the only proper conveyance between jointe nants. 2 *Saund.* 97. 2 *Ven.* 141, 260, 266. In 3 *Lev.* 29 that was pleaded as a grant, which could enure only as a cove nant to stand seised; and it was held ill. So is *Salk.* 8, 274.

Sed per curiam: The husband and wife may, or may no join in this action at their election, as where a bond is to bot of them. 4 *H.* 5. 6. *Cro. Jac.* 77. *Cro. Eliz.* 61.

In covenant the plaintiff need not set out a title, for *quod cum dimisisset* is enough, and if he does it wrong it is surplusage.

2. *Exception.* To the manner wherein the plaintiffs have de duced their title. Under this head we are to lay the husband ou of the case, and consider how the wife and the other person have made themselves out to be tenants in common. They say that one *James Scrape* was seised in fee of the demised premisses and that upon his death the same descended to him and her a cousins and heirs. Now the court cannot take a man and a woman, without more shewing, to be coheirs. The fact I suppose is, that the mothers of these two were sisters, who both died in the life of the ancestor, and so the plaintiffs, who are the respective issues of those parceners, stand now in the place of their mothers, and claim what would otherwise have be longed to them, in case they had survived *Scrape*. But then, in deducing their title, they ought to have shewn all this; for they must claim through their mothers to make themselves heirs to him that last died seised; for, according to the case of *Colling wood* and *Pace*, it is a mediate and not an immediate descent they must claim *mediante matre*. All the precedents of *forme dons* by cousin and heir shew how he became so, and in *Salk.* 355. it was held, that he who sues as heir, must shew come heir, and it is not sufficient for him to say generally, that he i heir.

1 Ven. 413.

10 Mod. 143.

It will perhaps be said, that this being an action of covenan the plaintiffs were not obliged to set out any title, but migh have begun generally, *quod cum dimisissent.* I admit they migh and then the court would have intended they had a title to mak this lease, when the other accepted it. But when the plaintiff undertake to set out a title, and fail in doing it; there is n room in that case for intendments, for the court will never i tend the plaintiffs have a better title than they themselves re upon. Every man is supposed to make the best of his own ca and upon that ground the rule is, that every man's plea shall taken most strongly against himself. *Plowd.* 104. *a.* 202. And in many cases what a man does unnecessarily shall vitia his proceedings, as where he misrecites a publick statute. 4 C 48. *a.* *Plowd.* 77. *b.*

Sed per curiam: The introduction by setting out the descent is nothing to the purpose here, where they declare upon their own demise, and therefore there can be nothing in that exception.

3. The breach is not well assigned: the covenant is in the disjunctive, *to pay or cause to be paid to them or any of them*; but as to part of the time the breach is only that he did not pay, and as to the other part, that he did not pay to them, whereas he may have caused the rent to be paid to one of them, which is a performance. And there being two ways, the breach ought to have been so large, as to exclude both ways, by either of which the act might be done. 21 *Ed.* 3. 29. *b.* And since the plaintiffs have in one breach obviated one part of the objection, and in the other the other part; this looks as if they were conscious of themselves that there was some variation in the fact: that where they say generally we did not pay, yet we may have caused to be paid; and that where they charge a non-payment to all, yet there might be a payment to one of them, which is enough within the words of the covenant. In a covenant to pay or cause to be paid, the breach may be general that he did not pay.

Sed per curiam: He that causes to pay, pays; and if you have paid the money to one of them, you may plead it in your discharge.

Then I moved to quash the writ of error, which describes the suit to be between the plaintiff and one *John Alcberry alias dict' John Alcberry* of *Waltham Abbey*, and the *alias dict'* is *abby* in the record, one is *b*, *e*, *y*, and the other *b*, *y*. This variance is in the *alias dict'*, where the court has always obliged the party to describe the specialty *literatim*. And in these cases you never go by the sound, because the party has something else to guide him; and if he mistakes, it is to be imputed to his own negligence. In a plea of misnomer indeed it is otherwise, because there the party has nothing to go by but the sound. Variance.

Mich. 13 *Ann.* the writ was *Crawley*, and the record *Crowley*. 12 *Ass. pl.* 2. *Annsty* and *Anesty*. *Pasch.* 4 *Geo.* *Shartless* and *Sharpless*. *Bro. Variance* 26. *Baxster* with an (*s*) and *Baxter* without an (*s*). *Salk.* 264. *Giggeer* and *Giggure*. All these were held to be fatal variances in the description of a record, and yet nobody will say they might have been taken advantage of by plea of misnomer in abatement. And I apprehend the reason of all these cases is what is laid down in Dr. *Drake's* case; that in all cases where the party has any record or specialty by which he *may* make an exact description, in such case the most minute variance is fatal. And Mr. Justice *Powys*, who held with the exception, about *not* and *nor*, said, that if the court once gave into solutions of those variances, they would never Salk. 660. Ante 201.

never know where to stop; but being once out at sea, would find it very difficult to steer into harbour again.

I must admit, that this writ of error would have been wel enough, if the *alias dict'* had been left out, because it is suffi cient if the record answers the description; and though it wou contain more, yet that excess must of necessity imply a fulnel and if there be a full answer to the description, it is as mu as is required. But though it would be good in such a cal yet I have often heard it said in this court, that though it not requisite to insert the addition, yet any variance whatsoev if the party will take upon him to be more than ordinarily pa ticular, is fatal; for then the record does not answer the d scription, as it does where the writ of error makes a total om sion of the addition.

Sed per curiam: The cases cited are of variances in the na of the party, which is more considerable than the place of residence. These words are both properly used, some spell *abbey* and some *abby*; and if there be occasion, we may t the latter as an abbreviation of the former. *Per curiam:* T record is well removed, and the judgment must be affirmed.

Between the Parishes of Little Bitham *and* Somerby.

Order reversed, final to parties; *confirmed,* to every body. Salk. 492, 524, 527.

A. Is sent by order of two justices to *B.* as the place of l last legal settlement. *B.* appeals, and the order is co firmed. Soon after, without stating that *A.* had gained a new settlement, *B.* sends him to *C.* *Et per curiam:* An orde reversal is final only between the two parishes: but if it confirmed, it is final as to all the world; and therefore no n settlement appearing, the order of removal from *B.* must quashed.

Hayman *versus* Rogers.

An inconsistent *postea* under a *scilicet,* rejected.

IN covenant, the plaintiff declared upon articles dated *Sept.* 5 *Geo.* (which is 1718,) not to set up a trade c baker, *a die datorum articulorum* for so many years, and t says, that *postea scilicet* 1 *May* 1718, (which is four months fore making the articles) the defendant did exercise the t in that place. And after verdict for the plaintiff, it was mo in arrest of judgment, that the time in the breach was no of that to which the restraint goes, and therefore the plai has no cause of action. *Sho.* 8.

Dar

Darnall Serjeant *contra*. The verdict cures it, for we could not have recovered without proof of an exercising after the date of the articles. *Per curiam:* Where that which comes under a *scilicet* is consistent with what went before, it is always looked on as an averment; but if it be inconsistent, we reject it. As in the common case in ejectment, where the lease is *a die dat'*, and the entry and expulsion laid the same day. We will reject the 1 *May* 1718, and then the case is that he covenanted the 30 *Sept. et postea* he committed the breach. *Judicium pro quer'*.

Scilicet, where an averment, and where not.

Brewer *versus* Turner.

REEVE moved to quash the writ of error, because the judgment is against two defendants, and so described in the writ of error, but then it is laid to be only *ad grave damnum* of one of them. Now the persons who are named under the *ad grave damnum* are they, and only they, who bring the writ of error. So that the case is no more than that one defendant brings a writ of error of a judgment against two, whereas all ought to join. 6 *Co. Ruddock's* case.

Qu. Whether one defendant may bring error of a judgment against two. 8 Mod. 305.

Strange contra. The first answer I would give to this objection is, that the ground and foundation of quashing writs of error is for some variance appearing between them and the record, of which there is none in this case. The three requisites in a writ of error are, to denote the court where, the parties between whom, and the subject-matter of the suit; all which are truly described in this writ of error. And then the saying it is *ad grave damnum* of one only, when it appears to be a judgment against two, can never be construed to be a variance; for if it be to the damage of both, it must be to the damage of each, and so the record answers the description. Whether therefore, when there is no variance, the court will quash this writ of error, or not rather put the party to demur to our assignment of errors, that I must submit to the court.

But waiving that, I take the writ of error to be well enough as it now stands. The fact is, that one of the defendants died before bringing the writ of error; but as that does not appear in the cause, I admit the case must be taken to be, that one defendant alone brings a writ of error of a judgment against himself and another, and this I apprehend to be well enough.

It will not be denied, but that, as this judgment is joint, if there be error in it as to one defendant only, yet the whole must be reversed. 1 *Roll. Abr.* 775. *E.* 2. *Cro. Jac.* 303. *Sti.* 121. And this may be done at the instance of that defendant only, who

who can say it is erroneous. 5 *Ed.* 4. 7. *a.* is express, that if judgment in trespass be given against three, one of whom was dead, the other shall not have a writ of error of that judgment, but only the executor of the party deceased; and yet the costs being joint, the judgment must be reversed *in toto*. *Bro. Joinder in action* 77. In trespass against two, who are condemned in an erroneous judgment, it is said, they may join or sever in a writ of error at their election.

There is but one precedent, which comes up to this case, and that is in *Hearn's Pleader* 466. in the book, but the right page is 370. and it is thus: "Because in the record and proceedings of a fine between *W. B. now deceased and J. V.* *plaintiffs* and *J. L.* deforceant error hath intervened, to the great damage of *W. B.* son and heir of the said *W. B.*" So that the heir alone brings a writ of error of a judgment against his ancestor and another, and assigns that for error which vacates the fine *in toto*. And if one plaintiff, who voluntarily joins himself with another, may when he pleases desert him; *a fortiori* may defendants sever in their writs of error, for they are not joined together at their own election, but at the will of the plaintiff. And agreeable to this entry is *Cro. Eliz.* 115.

If the defendants may not sever in their writs of error, the inconvenience will be great, that the plaintiff may if he pleases join me with a defendant who is under his own power, and will never consent to bring a writ of error; and then I shall be remediless, be the judgment never so erroneous. For as to what may be said, that summons and severance lies; that is only after a writ of error brought. If two bring a writ of error, and upon the *scire facias quare executio non*, one only appears: there summons and severance lies. *Yelv.* 4. And upon that the judgment is, that one alone shall prosecute that writ, which was brought jointly by them both. But if it be not brought by both, there can be no summons and severance; and therefore if one refuses to join, the other ought to be at liberty to bring it alone. And there will be no inconvenience to the plaintiff, for his judgment can but be reversed; and if it be erroneous, what matter is it to him whether it be reversed at the instance of all the defendants, or of one of them only?

Curia. If it had any where appeared, that the other defendant was dead; there is no doubt but this defendant alone without the executor of the other might bring a writ of error: but as nothing of that appears, and the judgment is joint; it should seem as if all must be mentioned under the *ad grave damnum*. And

And to this purpose was the case of *Pennoir* v. *Brace tempore* W. 3. 5 *Mod.* 338. *Salk.* 319. 5 *Mod.* 16, 69.

The writ of error was quashed, unless cause next term.

N. B. Hil. 6 *Geo.* the Chief Justice being in court, I stirred it again, and they all held the writ of error bad: so it was quashed, and I drew a new one.

Brocas *versus* Civit' London.

PER curiam: It was settled in Sir *Peter Delme's* case, and has always been the course of the court, that when either party will suggest any special matter about awarding the *venire* out of the common course, a copy must be given to the opposite party, and they must have a reasonable time to consider it, before you enter a *nient dedire*. Practice.

Newell *versus* Pidgeon.

PER curiam: If the plaintiff be nonsuit, and a judgment against him for costs, error lies *in Camera Scaccarii*. 1 *Roll. Abr.* 744. *F.* *Error for nonsuit.*

Biron *versus* Philips.

Practice. 2 R. Raym. 1382. 8 Mod. 366. Gilb. Cas. 95. *Anon.* post. 623, 635. S. P. in C. P. Barnes 304. Pract. Reg. C. P. 379. Rep. and Cas. of Pract. 1.

PER curiam: There must be the same notice of executing a *scire fieri* inquiry, as a common writ of inquiry.

Scotton *versus* Scotton. In Canc'.

A Daughter having married without her father's consent, he gave her no portion, but made his will, and thereby gave her 50*l.* to be lent out for her, and she to have the use of it. Her husband, being informed of this legacy, applies to the father for the money presently, who gave it him, and took a receipt for it in lieu of her portion, and of the legacy given by his will. The father died without altering his will, upon which his daughter and her husband sue the administrator in the spiritual court for the legacy, and the administrator brings his bill in this court. Legacy to a child discharged by provision subsequent to the will.

Vernon pro quer' quoted *Birkinhead* v. *Birkinhead* in lord *Egerton*'s time, where the father having by will given 1500*l.* a-piece to his three daughters, afterwards married one of them, and gave 1500*l.* portion, and then died without altering his will; and adjudged the portion a fatisfaction of the legacy.

Mafter of the Rolls. Whether this be a cafe relievable in the fpiritual court I am not certain: I rather think this receipt is not pleadable there, being a releafe of a legacy before it is due. But in this court it amounts to an agreement of the fon-in-law, to difcharge the legacy. Befides the precedents here run all this way, that a child's legacy is fatisfied by a provifion fubfequent to the will. Let the proceedings in the fpiritual court be ftayed.

Countefs Dowager of Mountacue *verfus* Maxwell. In Canc'.

What writing is fufficient to bring a cafe out of the ftatute of frauds and perjuries. S. C. 1 P. Will. 618. Eq. Abr. 19. pl. 4. 20. pl. 5. Prec. Chan. 526.

THE plaintiff married the defendant without any previous fettlement of her eftate, which was a very confiderable perfonal eftate. Quarrels happened between them foon after the marriage, and fhe exhibited her bill here, to oblige him to fettle her own eftate to her feparate ufe: fetting forth, that upon his addreffing her, fhe infifted on having the entire difpofal of her own eftate, and drew up a fhort writing with her own hand to that purpofe; that he promifed to fign it, but put her off on pretence of advifing with counfel, and having writings more at large prepared; that fhe frequently demanded of him to execute fuch writings, which he conftantly promifed, as foon as finifhed by counfel, but delayed it till fhe married him. That after marriage fhe preffed him by letter to perform his promife, and he anfwered her by another letter, that he thought it very reafonable fhe fhould have the difpofal of her own eftate, that he never intended the contrary, but that fhe fhould command her own fortune as fhe pleafed.

29 Car. 2. c. 3. The defendant denied he figned any fuch agreement in writing, and as to any *parol* promife he pleaded the ftatute of frauds and perjuries.

It was infifted on for the plaintiff, that the court frequently compels the execution of promifes not folemnized according to that ftatute, where fraud and trick appear, and where part of the agreement is carried into execution, as it is here by the marriage, which was the confideration of that promife. But *Parker* Lord Chancellor allowed the plea, and faid this was only a breach of promife, which is a fort of injury that this

court

court does not take cognizance of. If there had been fraud (as if pretending to execute a real deed of settlement he had imposed another on her) this might have made it a proper case for equity; but here is nothing of any such deceit: she marries him on his word and promise, without writing, and that is the very case the statute intended. To say therefore the agreement is to be executed in this court, because performed in part by the marriage, is to break the very words and intention of the statute, which has put this very case, and says it shall not be binding.

The plaintiff afterwards amended her bill by a further charge, that in order to induce her to marry him without a previous settlement, and to secure the performance of his promise in executing it afterwards, he promised to take the sacrament on it, and that he did take the sacrament on the marriage accordingly. That after the marriage he wrote a letter, wherein he promised to make such settlement, and that he was ready to sign the writings according to her desire.

To this he confesses he did take the sacrament on the marriage, but says he did it only in compliance with a custom established in the *Romish* church (of which he was a member) of receiving the sacrament on their marriages, and not to give any sanction to this pretended agreement. And as to the letter, he doth not remember the particulars, but if he has wrote any thing concerning his readiness to sign any writings, it only related to some proposals he had made of settling a sum of 1500*l.* on her, and which he did soon after sign. He then pleads the statute of frauds and perjuries again.

Lord Chancellor. The case is very much altered now, from what it was at first. Then it stood purely on the parol promise before marriage, upon which there was no colour to relieve the plaintiff. But such parol promise on marriage is sufficient consideration, to support a settlement made agreeable to it after marriage. This has been frequently determined. So it is also sufficient consideration to establish a promise made in writing after marriage. Now here is great evidence of such a promise made in writing after marriage; he doth not deny his writing, that he was ready to execute the writings as she desired; but avoids it by saying, they referred to proposals of settling 1500*l.* which is impossible, because it appears she never desired any such settlement. And though he says he has signed that settlement, it doth not appear when he did it; and I am very jealous he did it since the amended bill. His answer to the charge of receiving the sacrament in confirmation of his promise, is not at all satisfactory. He could have no occasion to promise receiving the sacrament, but on that account; and though he might receive it

it in compliance with the cuſtom of his church, yet that is very conſiſtent with his laying hold of that ſolemn act of devotion, to teſtify his ſincerity. Therefore let the plea ſtand for an anſwer.

Harriſon *verſus* Buckle. In Canc.

If a legacy be deviſed payable at 21, with intereſt in the mean time, and the infant dies, his repreſentative may ſue for it immediately.

A. deviſes to his daughter 1000 *l.* payable at her age of twenty-one or day of marriage, and 1500 *l.* to his ſon payable at the age of twenty-four, and a certain maintenance in the mean time; and all his real eſtate he deviſes to truſtees, to raiſe by ſale or otherwiſe ſufficient to diſcharge his debts and legacies, if the perſonal eſtate ſhould fall ſhort. *A.* dies; the ſon dies under age; the daughter marries the defendant, and they join in a ſuit in the ſpiritual court againſt the truſtees, who are alſo executors, for her own legacy of 1000 *l.* and as repreſentative of her brother for his 1500 *l.*

The executors exhibit their bill here, to ſtop the proceedings in the ſpiritual court, and compel the huſband to ſettle the legacy on the wife. The defendant inſiſts on his right to the legacy, independant of any ſettlement, he being now in a proper court for the recovery of it without the aſſiſtance of this court; and that he is intitled to the 1500 *l.* immediately, though the ſon was not to have it till his age of twenty-four.

Upon this two queſtions aroſe. 1. Whether this court could interpoſe on behalf of the wife, and ſecure the legacy for a ſettlement on her. 2. Whether the ſon's legacy of 1500 *l.* is not extinguiſhed by his death before it became due. Or if it ſubſiſts, whether his repreſentative is intitled to it ſooner than he himſelf would have been, if he had lived.

As to this laſt point Mr. *Vernon* ſaid, There had been caſes both ways, but were reconcileable on this diſtinction; where intereſt of the legacy payable at a certain age has been given to the infant in the mean time, there the money has been held payable to the repreſentative immediately: but where no intereſt has been given the money was not payable till the time the legatee would have arrived at that age. The preſent caſe, he ſaid, was a ſort of middle way between both: no intereſt, but ſome preſent advantage, *viz.* maintenance is given.

Maſter of the rolls. The 1500 *l.* given is firſt and principally a charge on the perſonal eſtate, and is an abſolute legacy out of that: the real eſtate is only deviſed in aid of the perſonal, nor is it

it to be sold directly, but only at the discretion of his trustees and executors, to be disposed of so far as the debts and legacies shall require. As this then is not a direct legacy out of the real estate, the death of the party before it became payable shall not extinguish it. And this differs from *Pawlet's* case, 2 *Vern.* 366. where the money was an immediate charge on the land, and to be raised out of that without any regard to the personal estate. The son's representative being thus intitled, the next question is as to the time. Had this 1500 *l.* carried interest immediately to the infant, though the time of payment of the principal was deferred, yet on his death his representative would have had a right to it immediately: not that he would have been in a better condition than the infant was, since the delay of payment was only by way of caution, but with equal benefit to the legatee. And the executor is not hurt, because on payment of the money the interest ceases. The appointment of maintenance is said to be equivalent to the giving interest, but I think not; interest carries the whole benefit of the legacy, but maintenance is something distinct and independant of it. It is a decent provision during minority, and bounded, not by the profit of the money, but the necessities of his sustenance and education.

As to the wife's legacy of 1000 *l.* the bill is of an unusual nature. It has indeed been the common course of this court, to oblige a husband who comes hither in right of his wife for a sum of money, to make a proper settlement on her, before it is given him; and that, not only in the case of trust money, which can be recovered no where else, but in the case of legacies too. Though I must say, had this been *res integra*, I should be very cautious, how I went so far as legacies, because there is a proper court elsewhere for the recovery of them: they originally belonged to the spiritual court only, and the sole ground of this court's intermeddling is, the discovery of the testator's personal estate. But the present case is different: the persons liable to pay the legacies are plaintiffs here, and not the husband; and whether they would not have been safe in paying the legacy, if they had suffered the spiritual court to go on to sentence, I will not say.

Where the court will oblige the husband to settle what he sues for of the wife upon her.

This seems to have something of the nature of an interpleading bill, wherein the executors call upon the husband and wife to interplead concerning their several rights: the husband to the money absolutely, and the wife to a proper provision to be secured for herself. And then it will be like the common case of a husband's coming into this court to have a legacy against his wife. And I have observed a strong inclination in Lord *Cowper's* time, to do right to the wife. Since legatary

causes

causes are now become part of the jurisdiction of this court, I think this is fit to be considered. The wife is not here, therefore let her attend, to acquaint us what provision she is willing to accept.

Hagshaw *versus* Yates. In Canc'.

A subsequent title which is both legal and equitable, destroys a prior title in equity only.

PER *Parker* Lord Chancellor. Where a legal estate and equity meet in the same person, they shall destroy a prior title which is only equitable. And where the inheritance of lands mortgaged for a term is conveyed by a defeasible but equitable title, and afterwards conveyed to another by a legal and equitable title; the latter shall have the benefit of the equity of redemption.

2 Vern. 764. 1 P. Will. Rep. 496. Bond to refund part of portion, set aside. Prec. in Chanc. 525. 10 Mod. 435.

Turton *versus* Benson. In Canc'.

THE bill was to be relieved against a bond obtained in fraud of a marriage settlement: and the case was thus. The plaintiff being a young man in 1710 made his addresses to one Mrs. *Benson:* the plaintiff's mother and uncle were concerned in transacting it for him, and on 29 *June*, 1710, marriage articles were executed, whereby Mr. *Benson* was to give 3000 *l.* as a portion with his daughter, and Mrs. *Turton* was to part with 300 *l. per annum* out of her jointure, to make a settlement on the marriage: but secretly, without the privity of the mother or uncle, the plaintiff gave a bond to refund 1000 *l.* part of the portion, to *Benson* at the end of seven years; and soon after, the marriage took effect. In 1713 *Benson* deposited this bond in the hands of Sir *Theodore Janssen* as a security for a debt, but made no actual assignment. In 1714 *Benson* died, and his wife the defendant took out administration; but his debts being beyond the value of his estate, the creditors came to an agreement amongst themselves and with her, whereby Sir *Theodore*'s whole debt was to be paid, and all *Benson*'s effects to be turned into money, and divided amongst the rest of the creditors, and the plaintiff's bond, and all the debts to be got in by the administratrix: and creditors on simple contract to be in equal degree with those on specialties. During this transaction one of the chief creditors acquainted the plaintiff with their designs, and that his bond was to be assigned to them: who answered, that if Mrs. *Benson* was to have the benefit of it, he would never pay it; but if they were, he would not dispute it with them. In this condition the bond stood in 1715, when the plaintiff brought his bill against the administratrix to have it delivered up. When that cause was at hearing, the creditors bring a bill against the plaintiff and administratix to discover collusion. Both causes came on before the Master of

of the Rolls, who decreed for Mr. *Turton*, and now they came by appeal before the Chancellor.

The queſtions were, whether this bond was void in its original creation; and if ſo, whether it has not been ſince made good by ſome ſubſequent matter, either by its being transferred for ſome valuable conſideration, or by the promiſe of the plaintiff not to diſpute it.

As to the firſt, it was ſaid by the counſel for the plaintiff, that it was a ſort of firſt principle, and ſettled rule in this court, to make void all contracts of this nature, whereby marriage articles, ſettled by the conſent of all parties concerned, are any ways defeated by the private agreements of ſome of them. And ſeveral caſes were cited, to eſtabliſh this rule. *Salk.* 156. where it was laid down as a rule, that a ſon without the privity of the father, or parent treating the match, gives bond to refund part of the portion, it is void. *Ibid.* 158.

Sir *R. Raymond* cited *Redman* v. *Redman* in 1685, in this court, where on a treaty of marriage the friends of the lady inſiſted on the huſband's diſcharging all his debts before the marriage. There was one bond which his brother agreed to pay for him, but underhand with the privity of the lady, who was afraid of loſing the match, took a counter ſecurity of the huſband; and the marriage took effect. Afterwards the brother paid the money on the bond, the huſband died, and he ſued the counter ſecurity againſt the widow, who had taken adminiſtration. She brought her bill, and, though privy to the fraud, was relieved; becauſe it was done originally to defeat a marriage agreement. 1 Vern. 348.

So in the caſe of *Gale* v. *Lindo*. On a treaty of marriage the fortune of the young woman not being ſufficient for the huſband, ſhe prevails on her brother to make up the deficiency by a bond of his; but privately agrees with him, that no uſe ſhould be made of it. They were married accordingly; and the huſband dying, ſhe took out adminiſtration, and put the bond in ſuit: the brother ſues here for relief, but denied becauſe the agreement was fraudulent. 1 Vern. 475.

Mr. *Vernon* quoted the following caſes to the ſame purpoſe. *Lumley* v. *Hamond*, *Mich.* 1714, a mother for the advancement of her ſon in marriage agreed to part with her jointure; the ſon at the ſame time had a leaſehold eſtate of his own, which he privately contracted to aſſign over to her in conſideration of what ſhe was to ſettle upon him: after the marriage the ſon died, and his repreſentative recovered this leaſehold eſtate out 2 Vern. 466, 499.

 of

of her hands by a decree of this court, because there was no mention made of that assignment on the marriage treaty.

1 Vern. 240. *Peyton* v. *Blackwell*, 9 *March* 1694, Mr. *Blackwell*, on the marriage of his nephew *Yelverton Peyton* with the daughter of Sir *John Roberts*, agreed to settle an estate of 200*l.* *per annum* on them for a jointure, and after his death to settle a further estate of 100*l.* *per annum* on him and his heirs. After the marriage it was discovered, that there was a private agreement between him and his nephew, that he should demise the first estate back again to *Blackwell* at 150*l.* *per annum* rent; and as to the reversionary estate, that he should release that; and such demise and release were executed accordingly: after the nephew's death his wife and Sir *John Roberts* sue in this court to set aside this private agreement, and had a decree, whereby *Blackwell* was to account for the profits of the estate in possession at the rate of 200*l.* *per annum* from the time of the demise, and to settle the other estate of 100*l.* *per annum* on the heirs of *Peyton*, to commence after his own death. *Sloan* v. *Fowler*. On the marriage of *Fowler*'s son with *Sloan*'s daughter, *Fowler* by articles was to make a settlement, and to have the portion to himself; but he told his son, the portion was not sufficient to pay younger children's fortunes, and so got a bond from his son for a sum of money beyond the wife's fortune: this bond came afterwards into the court of Chancery, and was set aside because it was taken without the privity of the wife's relations.

As to the second question, whether the creditors as purchasers of this bond for a valuable consideration are not in a better condition than *Benson* was.

For the plaintiff it was said, here was really no assignment at all; it was only deposited in Sir *Theodore*'s hands as a security but not designed to transfer the interest: or if there had been an assignment, that gives no property or right, a bond being a *chose* in action not being assignable but in Equity, and then it must be attended in the assignee's hands with all the circumstances of equity with which the first obligee held it. If therefore it was void in equity in its original creation, it cannot be made good by any equitable conveyance: the creditors can have no better right than *Benson* had: their right is only to his estate, which if he possessed unlawfully, can be no better in their hands. So it is in the case of bankrupts. Creditors under the assignment shall have no better right to the effects than the bankrupt himself had. 2 Vern. 564. *Taylor* v. *Wheeler*. Plaintiff had lent money on a copyhold estate, and a surrender was made accordingly: by the custom of the manor surrenders are void unless presented in a year, and this surrender was neglected to be presented

ſented: afterwards, and before the money was paid, *Wheeler* the debtor became bankrupt, and a commiſſion was taken out, and this copyhold *inter alia* aſſigned: the aſſignees get admittance, and the mortgagee ſues here for relief: they urge in favour of the aſſignees, that this copyhold continued in the bankrupt till his bankruptcy: the only thing that ſtuck with Lord *Cowper* was, that the plaintiff by his ſuffering him to continue in poſſeſſion, and not preſenting the ſurrender by which the mortgage might have been diſcovered, induced others on the credit of that eſtate to truſt him, and now the aſſignees have both law and equity of their ſide; but yet the plaintiff was relieved on that maxim, that the creditors ſhall be in no better condition than the bankrupt himſelf was.

And in theſe caſes where fraud has been purged by a legal conveyance on valuable conſideration without notice, yet the perſons that conveyed with notice of the fraud have been obliged to make it good. In the caſe of *Ferrers* v. *Cherry*, *Cherry* having notice of a ſettlement wherein the father was only tenant for life in equity, accepts a conveyance in fee from him, and afterwards ſold it to purchaſers without notice: on a bill by the ſon for relief, the purchaſers having law and equity on their ſide, had no decree againſt them, but the court went ſo far as to order *Cherry* to anſwer for the fraud. Another caſe was *Bovey* v. *Smith*. Truſtees had ſold without notice of the truſt in the purchaſer; he levied a fine, and nonclaim for five years: ſixteen years after, the truſtees purchaſe back this eſtate for a valuable conſideration: this appeared to the court on a bill by the *ceſtuy que truſt*; and though the fraud was purged, yet the court decreed the eſtate became again chargeable in their hands, and the lands were decreed to the plaintiff accordingly.

2 Vern. 384.

1 Vern. 60.

As to the plaintiff's promiſe, it was ſaid to be rather a compliment than a promiſe: or if it was one, yet there was no conſideration for it.

For the defendant Serjeant *Cheſhyre* and Mr. *Talbot*, could not diſpute the general rule of diſcharging contracts made in fraud of marriage-ſettlements; but ſaid the plaintiff ought not to come here, becauſe himſelf was not only not defrauded, but was even a party to the fraud againſt the mother.

The ſecond queſtion was chiefly inſiſted on. They ſaid the original fraud was purged by the ſubſequent conveyance for valuable conſideration, and likened it to the caſe of *Prodgers* v. *Langham*, 1 *Sid.* 134. where agreed *per curiam*, That tho' a deed be fraudulent in its creation, and voidable by a purchaſer: yet it may be made good by matter *ex poſt facto*; as feoffee by covin makes a feoffment for valuable conſideration, the

fecond feoffee has a good title. So in the cafe of *Ellis* v. *Warns*, *Cro. Jac.* 32. In debt upon a bond, the defendant pleads an ufurious contract between himfelf and one *A.* by which he became bound to the plaintiff for a debt he owed and which *A.* owed the plaintiff; the plaintiff replies a just debt without any privity of the ufurious contract between him and *A.* and on demurrer held a good replication.

Sarrot v. *Fielding* in Lord *Somers*'s time. *Sarrot* was defired by one *Dod* in the country to draw a bill for him on his correfpondent in town, payable to *Dodd* or order: he did fo, but infifted on the payment of the money before the delivery of the bill, but by reafon of a hurry of bufinefs then in the fhop it was neglected, and the bill was fent to town without the plaintiff's receiving any money for it: the defendant purchafed it, and fued the plaintiff at law: he applied here for relief, becaufe he had never been paid for it; but Lord *Somers* difmiffed the bill.

The promife of the plaintiff was faid not to be *nudum pactum*, becaufe though he gained nothing by it, yet the creditors parted with fome of their right, for they confented to admit fimple contract debts upon an equality with bond debts, and to pay Sir *Theodore* his whole debt; and a lofs on one fide is fufficient to raife an *affumpfit* in the eye of the law.

Lord Chancellor. Thefe private agreements, contrary to publick tranfactions, have been always difcouraged by this court, even where the parties have come to be eafed againft their own agreement. And this is fo far from diftinguifhing the prefent cafe from others, that it is a circumftance of all the cafes that have been cited, and indeed cannot he otherwife, fince the fettlements againft which thefe private contracts are made, are always for the benefit of the parties to the marriage. The impofition which the court provides againft is not upon the perfon that marries, but on thofe that are concerned in contracting for him; and I think this cafe as great a fraud as any that have been mentioned.

The next confideration is, whether the creditors have a better cafe of it then *Benfon*. And firft it is clear, that any affignment of *Benfon* could not have mended it; that would be to deftroy all the power and care of the court in cafes of this nature at once, for it is then but to affign over, and nothing can reach it. But he cannot properly affign a bond nor the penalty of it: the fenfe and meaning of fuch affignment is, that the affignee fhall have all the benefit, which the affignor would have of it, in equity. Suppofe a perfon affigns a bond that is paid, can the affignee take advantage of that bond?

But

But indeed in this case here is no assignment, nor any thing ike it.

But in the next place, though the party doing the fraud cannot ake the bond better; it is another consideration whether e party injured cannot amend it. And I think he may as r as the consideration of it goes; for the bond is not absolute- void; and though the mother is the person injured, yet if e son independent of the marriage will afterwards give a new ond for it, I think it will stand good against him. But there s nothing of that nature in the present case: there is no as- signment to the creditors. The composition and agreement mongst the creditors is beneficial to them, without any con- sideration of this bond. The plaintiff's promise insisted on was without any consideration at all: it does not appear that it in- duced the agreement, or any thing was done on it, but what would have been done without it. Creditors are indeed inti- tled to favour, but it is only with regard to the debtor's estate, and not other peoples. I think the decree of the Master of the Rolls is right, and ought to be affirmed, and a perpetual in- junction go as to the bond.

South *versus* Jones.

Intr. Hil. 5 Geo. rot. 396.

THE plaintiff declares, that he being occupier of certain lands in *Downham*, 20th of *August* cut down his grass and divided it into cocks, and the same day gave notice to the de- fendant, who was rector, to come and carry away his tithes, which he has not done, *per quod* he lost the use of that part which was under the cocks, from the said 20th of *August* to the 10th of *December* following. The defendant pleads, that for all that time the close where, &c. was surrounded with ditches; and that the ditches, ways and passages were so filled with water, that he could not carry off his tithes. The plain- tiff replies, that the ditches, ways and passages were not so; and the defendant demurs.

Parson not obliged to take tithe of grass the day it is cut, but may let it lie there long enough to make it into hay.

Bootle pro defendente. The declaration is ill, in demanding more damages than the plaintiff ought to go for; he demands from the time of mowing, whereas the parson is not obliged to carry it away then, but it must lie till the parishioner has made it into hay. 1 *Roll. Abr.* 643. X. 1 *Roll. Rep.* 420, 172. We are not after a verdict, where this might be helped by a release, but on a demurrer. So *non constat* the plaintiff will re- lease.

2. The replication is ill in offering to put the whole time in iſſue, and though we plead to the whole, as we were obliged, yet the fault is in them.

3. The replication is in the copulative, ditches, ways and paſſages, when it ſhould have been in the disjunctive. 2 *Saund.* 205. 3 *Keb.* 162.

C. J. The declaration is ill, for it ſhould have ſhewn when it was made into hay, and dated the wrong from thence: the replication is well enough in the copulative, becauſe the plea is one entire matter of excuſe, and the defendant relies on the whole, and not on each particular's being impaſſable. *Et per Powys* J. The defendant has not denied the wrong which the plaintiff has laid, but takes upon him to excuſe the whole. *Et per Eyre* J. Suppoſe the tenant will not make it into hay, the parſon has no remedy to compel him, but he may do it himſelf, which it appears he has had time enough for. *Forteſcue* J. The iſſue is well offered, for the paſſages being over the ditches, (as they muſt be, becauſe it is ſaid the cloſe was ſurrounded) it was proper to put it in the copulative. The time laid in declarations is for the moſt part immaterial, and in treſpaſs it is ſufficient if part of the time be according to law, becauſe the jury may apportion it, or the party releaſe it: it is plain here is a wrong for ſome part of the time, and I believe the precedents will warrant this declaration. *Hearn* 725. 1 *Brown.* 69, 70. *ulterius.*

Cheſhyre Serjeant *pro defendente.* If the parſon is hindred by the act of God, or the party, from taking his tithes; it is an excuſe. 1 *Roll. Abr.* 109. *pl.* 37. Though our plea is double, yet it is a principle in pleading, that if the other does not demur, he muſt anſwer the whole plea. Our plea amounts to this. The way, ſays he, to the cloſe was very bad, and if I could have got through it, yet when I came to the cloſe, it was ſo encompaſſed with ditches, and thoſe filled with water, that I could not have got over. The replication puts us to prove both, when either is an excuſe, and therefore it is bad. 1 *Saund.* 268.

The declaration likewiſe is ill, becauſe the defendant cannot be guilty as to all the time; for the court will take notice, that it is impoſſible to make the graſs into hay the ſame day it is cut: and the parſon has of common right time to have it made into hay. If a man reſerves a roſe, the court ſo far reſpects the order of nature, as not to make him pay it in winter.

-ve contra. The plea is not double, but the defendant re- -on it as making one entire excuse, and therefore we have -ly traversed the words of it in our replication.

to the declaration, it is well enough, for the measure of -mages is not how long the cocks remained after they were -ut after a reasonable time to remove them; as in an for beating his servant, *per quod servitium amisit*, the of the servant is not the measure of the damages, but it loss of service which the master recovers for; and what -asonable time in this case, is matter of evidence, and -e left to a jury.

if we do go for too much, they are not proper to make -jection, till they see whether we take damages for an -er time; for as part of this time is well alleged, the -ay sever the time, and give damages accordingly.

-ys J. held with the plaintiff. *Et per Eyre* J. The plea double, for the first part is only inducement, but the *gist* s the ditches being filled with water; so the replication -g the plea is right. It is certain the defendant let his lie too long, and that is a damage to the parishioner. -ntinuando is laid in trespass, the jury may give damages -art of the time only.

-tescue J. The replication is well enough, for the substance plea is but one fact, That he could not come at his tithes; l the rest is only matter of circumstance. We cannot what is a reasonable time, because of the accidents of -ind weather, but that is to be left to a jury; and if the -ff had gone only from three or four days after the cutting, -ot see how that could have mended the case upon a de- -. *Judicium pro querente.*

Hilary Term

6 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Justice.*
Sir Littleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Justices.*
Sir John Fortescue Aland, *Knt.*
Nicholas Lechmere, *Esquire, Attorney General.*
Sir William Thomson, *Knt. Solicitor General.*

Whitehead *versus* Barber.

Notice of trial to a turnkey, good. 4 & 5 W. & M. c. 21.

PER *curiam:* Upon conference with the other courts they and we are of opinion, that within the reason of 4 & 5 *W. & M. c.* 21, which appoints, that the delivery of a declaration against a prisoner to the gaoler shall be good, a notice of trial to him is good also, though the defendant has an attorney in one case and not in the other.

Pierce

Pierce *versus* Hopper.

Int. Pasch' 5 Geo. In B. R. rot. 187.

Construction of statute relating to the piloting ships. 3 Geo. 1. c.

DEclaration *sur attachment* in prohibition, wherein the plaintiff sets forth, that before the making of the statute 3 *Geo.* intitled, *An act for the better regulating of pilots for conducting of ships and vessels from* Dover, Deal, *and the isle of* Thanet *up the rivers of* Thames *and* Medway, he was publickly examined by the elder and more experienced members of the society of pilots of *Trinity-house* touching his skill and experience in the piloting of ships, and being upon such his examination approved of, he was admitted a member of that society, and was afterwards confirmed accordingly. That after making the statute he was a second time examined, admitted and confirmed, and that, according to the direction of that statute, his name, age, and place of abode were put into the list and hung up at the custom-houses in *London* and *Dover*, by virtue whereof he then became and has ever since continued a member of that society, and as such ought to enjoy the privilege and profits which every member is intitled to. That the exposition of all statutes, the placing and displacing of officers, matters of freehold and all other matters arising within the body of the county, whether by land or by water, belong to the king's courts of record, and not to the courts of admiralty, unless specially provided for by acts of parliament. That the rivers of *Thames* and *Medway* are both *infra corpus comitatus*, and not within the jurisdiction of the court of admiralty of the *cinque* ports, but all matters arising out of that jurisdiction are properly determinable in the king's courts of record. Notwithstanding which the defendant, intending to prejudice him, has drawn him into plea in the court of admiralty of the *cinque* ports for a penalty or forfeiture of 10 *l.* and by his libel suggests, That time out of mind there has been a useful and well regulated society of pilots of *Trinity-house* belonging to *Dover*, *Deal*, and the isle of *Thanet*, who have had the sole piloting and loadmanage of ships and vessels up the rivers of *Thames* and *Medway*. That by the rules and orders of this society every person ought to be examined touching his skill in pilotage, before his admission to be a member, or undertaking to pilot any ship or vessel up the said rivers. That by the statute 3 *Geo.* it is enacted, "That if any person shall undertake to pilot any ship or "vessel from *Dover*, *Deal*, or the isle of *Thanet*, up the said "rivers, before he shall be publickly examined, approved, and "admitted into the said society, as has been usual in the man- "ner that has been mentioned, every such person shall for the "first offence forfeit 10 *l.* for the second 20 *l.* and for every

"other offence 40 *l.* to be sued for and recovered with costs of "suit by any person whatsoever, in the court of admiralty "of the *cinque* ports, if the offender be found within the ju-"risdiction, or else by action of debt, bill, plaint or informa-"tion in any of his majesty's courts of record, to be distri-"buted in the manner which the statute directs." That the now plaintiff, after making the said statute (*viz*) 13 *July* 1718, did take upon him to pilot the ship *Stratford* from *Dover* to *London* up the river of *Thames*, not having been first examined and admitted a member of the said society, as has been usual, by which he forfeited the sum of 10 *l.* (this being the first offence) and because the now plaintiff lived within the jurisdiction of the court of admiralty of the *cinque* ports, therefore the defendant caused him to be summoned into the said court, in order to proceed against him for recovery of the penalty. That notwithstanding he alleged all the matters aforesaid in his defence, yet the defendant, the further to oppress him, libelled against him a second time, thereby suggesting, that for time immemorial there have been certain by-laws, customs and usages made and practised in the said society, and that it has been always usual for every member on his admission to take an oath to observe and keep such by-laws, customs and usages, before made, or then after to be made. That by ancient usage it has been customary, on due summons, to remove any members acting contrary to the by-laws, customs or usages, or breaking the aforesaid oath, and every person so removed has been always deemed and taken to be in the same condition, to all intents and purposes, as if he had never been admitted a member of the society. That the now plaintiff was examined, admitted, sworn, confirmed and inlisted as the statute directs. But that afterwards he offended against the by-laws, and broke the customs and usages of the said society, and acted contrary to his oath: and thereupon, and upon due summons and proof of such offence, and hearing what he had to say for himself, he was, according to the ancient usage, removed and expelled from being a member of the said society, whereby he became as if he had been never admitted. That after such removal he, (not having been again examined, approved, and admitted into the said society) 3 *August* 1718, did take upon him to pilot the ship called *Stratford* from *Dover* to *London* up the river of *Thames*, against the form of the statute, *per quod* he forfeited the said 10 *l.* That to this second allegation in the court of admiralty of the *cinque* ports the now plaintiff demurred in law, and put it in the judgment of the court whether he ought to be compelled to make any answer to it, *ubi revera et in facto* he says, the court of admiralty had no jurisdiction to proceed against him for the penalty, inasmuch as he had been once admitted and sworn a member as the statute requires, and had alleged the same in his defence; notwithstanding which the defendant is proceeding against

against him after a writ of prohibition delivered. The defendant as to the contempt pleads Not guilty, and for a consultation demurs.

Yorke pro defendente. Before I enter upon the merits of this cause, I must observe, that as this record stands, the facts of our several allegations in the court of admiralty of the *cinque* ports must be taken to be true; for the now plaintiff has by his demurrer to the second allegation admitted the fact, and offered to put it in the judgment of the court, whether upon that state of the case it be sufficient to compel him to make any answer at all to it. There is likewise a demurrer to the declaration in this court, which if the other was out of the case would have the same effect. Neither is the power of removal to be at all questioned, but it must be taken to be a legal removal.

The main question in this case will arise upon the first clause in the act of Parliament, which after reciting the great usefulness of this society to the publick, and the danger in admitting persons to pilot ships, who are not members of that society, enacts, "That if any person or persons shall, after 1 *August* 1717, "take upon him or themselves to conduct or pilot any ship or "vessel by or from *Dover*, *Deal*, or the isle of *Thanet*, to any "place or places in or upon the rivers of *Thames* and *Medway*, "before he or they shall be first examined, as has been usual, "by the master and wardens of the said society or fellowship for "the time being, touching his or their abilities, and shall be "approved and admitted into the said society at a court of "loadmanage by the lord warden of the *cinque* ports or his "deputy, and the said master and wardens for the time being, "every such person shall forfeit for the first offence 10*l.* (which "is the penalty we go for) to be sued for and recovered in the "court of admiralty of the *cinque* ports, if the offender be "found within the jurisdiction, or else in the courts of *Westminster-hall.*"

Upon this clause I shall insist, that the now plaintiff having been legally removed from being a member of the society, is (notwithstanding his former admission) such a person as is prohibited by this act from piloting any ships or vessels within the limits that have been mentioned, and consequently that he hath incurred the penalty for the first offence, and being found within the jurisdiction of the court of admiralty of the *cinque* ports, there was sufficient to found the jurisdiction of that court in the suit which we commenced there against him, and therefore a consultation ought to go,

For this purpose I shall shew, that he is both within the words and intention of the statute,

As

As to the words. It will be objected, that the now plaintiff did not pilot this ſhip *before* he was admitted a member of the ſociety; for there was a previous admiſſion, which is enough to ſkreen him from the penalty, though as to any other benefit he is totally deprived by his expulſion out of the ſociety.

To this I anſwer. That this is not the proper conſtruction of thoſe words; the plain and natural import of which I take to be, that all perſons ſhall be excluded, who are not, at the time of piloting any ſhip, members of that ſociety. It may not be improper to obſerve, that by the preamble of this act, the members of the ſociety are deſcribed to be perſons who have been publickly examined touching their ſkill and abilities in pilotage before their admiſſion. It takes notice of the many and great advantages of the fellowſhip as a fellowſhip, and the good orders and regulations the fellowſhip is under; and therefore it is conſiderable, whether the enacting clauſe, which prohibits all perſons before their admiſſion from acting as pilots, ſhall not be taken to be only a large deſcription of a member of the ſociety, by ſpecifying the particulars that make up and conſtitute a member. The preamble ſays, "That all members have been examined, and "then approved and admitted." The enacting part prohibits all perſons not examined, approved and admitted; that is, all perſons who are not members of that ſociety; for this muſt be underſtood of an approbation and admiſſion ſubſiſting and in force, ſuch as are valid at the time the party exerciſes the buſineſs of a pilot, and not ſuch as have been made void and done away by a ſubſequent removal; for how can it be ſaid that any perſon ſtands approved by this ſociety as a pilot, who is ſo far diſapproved that he has been turned out.

And this is further explained by the proviſo which follows; and excuſes perſons who undertake the pilotage of ſhips, when no one of the ſaid ſociety or fellowſhip ſhall be ready to conduct and pilot the ſame. So again, it provides, that all maſters of ſhips ſhall have liberty to make choice of ſuch pilot of the ſaid ſociety or fellowſhip, as he ſhall think fit; and no perſon ſhall continue in the ſaid ſociety or fellowſhip, who ſhall not comply with the directions of the ſtatute in what is there mentioned. So that every clauſe being tied up to the being of the ſociety or fellowſhip, makes it evidently appear, that whoever undertakes to pilot any ſhip, muſt be at that time a member of the ſociety, or elſe that he ſhall incur the penalties.

This I take to be the plain meaning of the words; but even the intention of the act goes to this caſe: That a perſon once admitted,

admitted, and afterwards removed, was as fully intended to be excluded from the pilotage of ſhips, as any other perſon who had never been admitted at all. But that what I ſhall offer upon this head may the better have its weight, I ſhall firſt obviate an objection or two which may be made.

It may be objected, that this is a penal ſtatute, and that penal ſtatutes are not to be taken by intendment; and therefore the plaintiff not being within the words, ſhall never be expoſed to what may be argued to be the intent of the ſtatute.

I muſt admit this to be the general rule of conſtruction of penal ſtatutes; but then it is under certain limitations and reſtrictions, and many caſes there are which break in upon it. For there is an higher rule of conſtruction than this, and that is, that all ſtatutes which are made *pro bono publico* ſhall be expounded in ſuch a manner, that they may as far as poſſible attain their end. That this ſtatute is a law made *pro bono publico*, I believe will not be diſputed. The nature of the thing ſpeaks it, and the ſtatute itſelf takes notice *of the many and great advantages of the ſaid ſociety or fellowſhip to the publick.* In *Magdalen college* caſe it is ſaid to be the office of judges, to make ſuch a conſtruction, as will redreſs the miſchief, and advance the remedy, and to ſuppreſs all evaſions which may be made in order to continue the miſchief; that the law will never by any conſtruction advance a private intereſt to the deſtruction of the publick; but on the contrary will advance the publick intereſt as far as poſſible, though it be to the prejudice of a private one. So likewiſe is 3 *Co.* 7. *b.* It would be endleſs to cite caſes where penal ſtatutes have been taken by intendment, and therefore I ſhall only ſingle out two, which are ſtronger than the caſe at bar, inaſmuch as the penalties are far greater, and one of them extends even to the life of the offender. 11 Co. 71. b.

By the ſtatute of 27 *Ed.* 3. *c.* 1. it is provided, "That if any "perſon ſhould draw another to the court of *Rome* for a matter "which might be determined in the king's courts, or to over- "throw the judgments given in ſuch courts, ſuch perſon ſhould "have day by the ſpace of two months, *and if he came not at "the day*, he ſhould be put out of the king's protection." Upon this ſtatute a queſtion was made in 30 *Ed.* 3. 11. *b.* whether, if the offender ſhould appear and be convicted, he ſhould incur the danger of a *praemunire*; and afterwards in 39 *Ed.* 3. 7. *a.* it was reſolved he ſhould: and yet that caſe is as much out of the letter of the ſtatute as our caſe: and many judgments have followed that reſolution. 44 *Ed.* 3. 36. *a.*

The

The other caſe I ſhall mention is in 2 *R.* 3. 10. *a.* which was a queſtion made upon the 8 *Hen.* 6. *c.* 12, which enacts " That if record be razed or ſtolen away, *by reaſon whereo* " *any judgment is avoided*, the offender ſhould ſuffer death as a " felon;" the razure in that caſe tended to ſupport the proceedings, and yet it was reſolved to be felony.

Taking it therefore, that we are proper to conſtrue the words of this ſtatute in this manner; I ſhall now proceed to ſhew, that the offence of the plaintiff is ſuch an offence, as was deſigned to be puniſhed in the manner we are proceeding againſt it. The ſtatute takes notice of the good rules and orders of the ſociety, which tend ſo much to the advantage of the publick; and by requiring every member to be firſt examined, their deſign was, that no perſon ſhould have the pilotage of any ſhip, who was not to be under the awe, and ſubject to the rules and orders of the ſociety; leſt (as the ſtatute takes notice) unqualified perſons ſhould undertake the pilotage, whereby the ſhips and veſſels with their cargo and mariners ſhould be loſt. Every pilot is likewiſe required to have his name hung up at the cuſtom-houſes, that the merchants and maſters of ſhips may know who to apply to, and what perſons they may ſafely truſt. But this man at the time of piloting this ſhip was not under the controul, or in any degree ſubject to the rules and orders of the ſociety; his name ought not to be hung up at the cuſtom-houſe, ſo as to be known to the merchant, or any others who wanted the aſſiſtance of a pilot, becauſe none but the names of members are to be ſo liſted: a perſon who had never been admitted could but be in the ſame condition; he is only prohibited from piloting of ſhips, becauſe he will not be under any regulation, which is ſo neceſſary for the ſervice of the publick.

To inforce this a little, I would ſubmit, that perſons who have been legally removed from offices or employments, are to be conſidered in the eye of the law to be in the ſame caſe, as if they had never been admitted into ſuch offices or employments. Suppoſe the by-laws of the city of *London*, inſtead of prohibiting perſons *not being free* from exerciſing a trade, had run, that no perſon *before he was admitted a freeman* ſhould ſet up any trade;
8 Co. 121. b. I take it within the reaſon of *Wagoner*'s caſe, that ſuch a perſon after disfranchiſement would be as much ſubject to the penalties as perſons not being free are upon the preſent eſtabliſhment. By the act of uniformity 13 & 14 *Car.* 2. *c.* 4. §. 14. it is provided, " That no perſon ſhall be capable " to be admitted to any benefice or eccleſiaſtical pro- " motion, or preſume to adminiſter the ſacrament, *before* " *ſuch time as he ſhall be ordained prieſt*, according to

" the

"the form of the book of common prayer, under the penalty "of 100*l.*" Now will any body say, that if a clergyman be legally deprived, yet because he has been once episcopally ordained, that therefore he may officiate wherever he pleases? No, that ordination is to all intents and purposes as if it had never been, and the person liable to the penalty, or else this would prove a very vain provision. By the 11th section of the same statute every schoolmaster is prohibited from teaching any youth, *before licence obtained* from his respective ordinary, under certain penalties: now though the bishop does grant such a licence, yet it will not be pretended, but that it is in his power to repeal it; and supposing he does so, must this man still continue to keep a school? I apprehend he cannot; for if he may, the consequence of that will be, that if the bishop upon any misinformation should once grant such a licence to a person never so unfit, and in whom he was much deceived; that then this person might go on in teaching school, and corrupt our youth, when at the same time there is an express act of Parliament, which was made to meet with and oppose so great a mischief. In 2 *Keb.* 538. where the libel was for teaching school *after* licence repealed, a prohibition was denied. In our case may not it happen, that a man shall get the usual points of examination so well, as to pass a publick examination; and yet when he comes to act as a member of the society, he may be found to be ignorant, or not fit to be instrusted? This may be (and I am afraid has often been) the case, and will it then be pretended to be reasonable, that this person may continue to act as a pilot, and ruin the merchant who commits his ship to his care? I apprehend the reason of the thing tells us, that this man ought to be dismissed from the society; and if he ever afterwards concerns himself in the business, he shall be subject to the same penalties as in case he had never been once admitted. The same reason holds in both cases, *et ubi est eadem ratio, ibi idem jus.*

It will be objected, that admitting this case to be within the intent of the legislators, yet this is a proceeding in a course different from the rule of the common law: so that though a jurisdiction be given them in one matter, yet that may not be extended by equity to similar cases.

This admits of several answers. In the first place I must observe, that if it be admitted (as they who argue in this manner must admit) that this case is in equal mischief, and a similar case; then it is also admitted, that it is just and reasonable it should stand within the same remedy, if it may be: if one offence be of as bad consequence as the other, what reason is there to favour one offender more than the other? which will unavoidably be the case, if the court of Admiralty of

of the *cinque* ports has no jurisdiction of this cause. Nay it will go so far, as to exclude any remedy at all against the offender; for the jurisdictions given to the King's courts, and the court of Admiralty of the *cinque* ports, are exclusive, and not concurrent jurisdictions, and to be made use of in different cases: the suit is to be commenced in the court of Admiralty of the *cinque* ports, if the offender lives or is found within the jurisdiction, or else by action of debt in the King's courts of record: now the words *or else* exclude the courts of *Westminster-hall*, from any jurisdiction in cases where the party is to be found within the inferior jurisdiction: the plaintiff is to resort to one, if the offender lives or is to be found within it; but if he cannot, then, and not till then, he is to seek his remedy in another place.

We are now got so far as to take it for granted, that the plaintiff in this case was designed to be punished for offences committed after his removal: now if what is contended for on the other side should prevail, it may so happen, that such an offender may keep entirely out of the reach of the statute: for suppose he should continually live within the jurisdiction of the court of Admiralty of the *cinque* ports; then upon my former reasoning he could not be proceeded against in any other court: the consequence of which will be, that if this jurisdiction does not extend to similar cases, the offender must go unpunished.

Where inferior courts have been allowed jurisdiction in cases similar to those wherein they have jurisdiction.

But further, I take it to be no new thing for inferior courts, nay courts proceeding by the rules, and in the forms of the civil or ecclesiastical law, where jurisdiction is given them in a particular case, to have a jurisdiction by construction in similar cases within the like mischief. The statute of *Circumspecte agatis* mentions only the bishop of *Norwich*, but yet because what is reason in his case, must of necessity be reason in the case of any other of the bishops, therefore it has been construed to extend to all. 2 *Inst.* 487. The same statute, after mentioning fornication and adultery, has the word *hujusmodi*, and has therefore been expounded to include incest and solicitation of chastity. 2 *Inst.* 488. So the statute of *Articuli cleri*, *c.* 9. gives remedy where *animalia rectorum* only are taken; and yet in 27 *Ass.* *pl.* 66. it was held to extend to abbots and priors, who were within the same reason. The statute 2 *E.* 6. *c.* 13. gives the double value for not dividing, and setting out predial tithes, to be recovered in the ecclesiastical court according to the ecclesiastical laws; and yet that has been extended to the case where he does actually divide them, but then carries them away before the parson has time to take them; and yet the ecclesiastical jurisdiction is given only in the case of not dividing and setting out of tithes. But because it was the intent of the statute, that the setting out should be in such a manner,

as

as that the other might have the benefit of them; therefore this device to elude the ſtatute was not allowed to prevail. 2 *Inſt.* 649. The decree relating to tithes in *London*, which is confirmed by 37 *H.* 8. *c.* 12. has the words, "Where no rent is "reſerved upon a leaſe of a houſe by reaſon of any fine or in-"come paid before hand:" and upon this, 2 *Inſt.* 659, 660. it was reſolved to extend to caſes where no fine or income had been paid before hand; which was not a caſe within the words of the ſtatute, any more than our caſe is.

There remains ſtill another objection to be anſwered, and it is this. That to allow the court of Admiralty to proceed in this caſe, is to give them a power to judge of disfranchiſements, and the validity of corporate amotions.

Court of Admiralty may judge of matters not originally within their juriſdiction, ſo as they come in by way of incident.

To this I anſwer, That though they cannot have original cognizance of ſuch matters, yet they may examine into them where they come in only by way of incident. Out of the many caſes that might be cited for this purpoſe I ſhall ſelect a few, to ſhew that the rule *acceſſorium ſequitur, non ducit ſuum principale*, holds equally in inferior and ſuperior juriſdictions. *Bracton*, *lib.* 5. *f.* 401, 406. *Regiſt.* 58. The ſpiritual court, or court of Admiralty, may judge of a ſtatute, where it comes in incidentally. 2 *Roll. Abr.* 308. *pl.* 22. In *Yelv.* 134. a ſuit was commenced in the Admiralty for being aſſiſtant to the eſcape of one committed for piracy; and notwithſtanding the offence in abetting the eſcape was committed upon the land, yet in regard it was a dependant upon the offence of piracy, it was reſolved to be cognizable there. 1 *Roll. Rep.* 21. In a ſuit for tithes the defendant pleaded an arbitrement, and a prohibition was prayed for that, and denied. *Latch* 228. The right to the office of Chancellor of the biſhop of *Glouceſter* came incidentally in queſtion in the high commiſſion court; and becauſe they had juriſdiction of the principal matter, no prohibition went.

If therefore the now plaintiff ſhould be thought not to be within the letter, yet ſurely he is within the reaſon of the ſtatute; and being ſo he is liable to be proceeded againſt in the court of Admiralty of the *cinque* ports, and therefore a conſultation ought to go.

Whitaker Serjeant *contra*. I ſhall ſhew that the plaintiff is qualified within the words of the act, which is ſufficient to ſkreen him from the penalty. The demurrer can never be taken as an admiſſion of the conſtitution and power of removal, for that conſtitution is no otherwiſe ſet out than in the libel; and if any thing ſtands admitted by the demurrer, what we ſay, that

 the

the defendant *falso et subdole libellando*, &c. is confessed, for that denies the truth of the libel, as in 27 *H.* 8. 11. *quare crimen feloniae falso imposuit*, was held to be an absolute denial of the crime.

Then as to the demurrer below, that confesses nothing but what is well pleaded; and in this case they have not pleaded the merits as they ought, for they should have shewn, whether they are a corporation, or only a voluntary society; that they had a power to make by-laws, and that the by-law, against which my client is supposed to have transgressed, is a good and a reasonable by-law: all this should have appeared to the court; and instead of demurring to our declaration, they might have come and shewn all this by plea. *Rast.* 393. 18 *E.* 4. 29. *Co. Ent.* 122. For how else can they pray a consultation, without establishing the justice of their proceedings, and laying the whole matter before the court.

As to the merits, I apprehend this statute ought to be construed strictly, and that upon three accounts. 1. Because the subject-matter of it is an inferior jurisdiction. 2. Because it is introductive of a new law. And 3. Because it is a penal law.

1. As it is an inferior jurisdiction, it is confined to time and place, to persons, actions, and things, as they are mentioned in it. In the case of the *Marshalsea*, 10 *Co.* 75. it was held, that *trespass* would not include *ejectment*, or where a *detainer* is coupled with it; and that is the case of an ancient court, this, of a new one. If the sheriff's torn be held at a different time from what *Magna charta* directs, it is ill. 2 *Inst.* 71.

2. Affirmatives in a new law imply a negative. *Hob.* 298. Nay where it is a remedial law, as in the case of a *quod ei deforceat* in 14 *H.* 7. 18. and a *cui in vita* in 18 *E.* 4. 16. 2 *Inst.* 352.

3. This is a penal law, restrictive of that natural right which every man has to have the benefit of his labour and industry, and it gives a remedy which was not at common law before, and is therefore to be taken strictly. *Keilw.* 96. So the custom of gavelkind, that an infant may alien, was held not to warrant a release. 10 *H.* 4. 33. And the same limited construction has always been made upon the statute of limitations.

I agree the rule of exposition laid down about statutes made *pro bono publico*, with this restriction, that they are no way derogatory of the common law. In this case the statute provides for the

the punishment of persons who lose ships, and that is an argument that they had no notion of a power subsisting in this society, to remove a man for that or any other offence.

But what I insist upon is, that the removal must be laid out of the case; and the only question now is, whether this man was ever examined, approved and admitted: it appears he has been examined, approved and admitted, and being so, he is not a person in any wise prohibited from acting as a pilot. The cases where the spiritual court has judged of matters of freehold, are not like this; for in them they had original jurisdiction of the principal cause. And no case can be shewn where when an act was lawful at common law, and then an act of Parliament has come and altered the nature of it by rendering it unlawful, that such a statute has been extended to similar cases, which I am far from admitting ours to be.

Yorke replied. The argument from the words *falso et subdole* (which are words of course in all suggestions) is nothing to the purpose, for the truth of those facts is not yet determined, the question being whether the court below shall proceed to examine into them. But there was a demurrer below precedent to their suggestion in this court, and that demurrer has put it in the judgment of the inferior court, whether, taking our libel to be true, there is disclosed sufficient for the inferior judge to condemn the party.

I agree that by-laws must be set forth, where the point of amotion is in dispute; but not here, where it comes in only by way of incident, in which case the bare alleging, that he was removed, is sufficient. *Bro. Pleading* 87.

Almost all acts of Parliament alter the common law, and yet many of them are construed liberally.

C. J. The question is, whether the plaintiff has incurred the penalty of the statute; for if he has, the jurisdiction of the court of Admiralty of the *cinque* ports to proceed against him for that penalty, is not to be doubted.

As to the words of the statute, I think there is no colour to say the plaintiff is within them; for they extend only to persons not examined, approved and admitted. And therefore he is not within the words.

In the next place, to consider the intention of the statute; it should seem as if there was a great difference between the case of one never admitted, and the case of one who has been admitted

 and

and afterwards removed: a man that undertakes to pilot a shi *before* any admission, acts knowingly against the express wor of an act of Parliament; and there is room to suspect his igno rance as to the business he undertakes: but where a person h been once admitted, though he be afterwards removed, yet the is no room to doubt his skill in pilotage, because he has passed publick examination, and it may be the removal was not f want of skill, but upon some other account, which may affo no ground to distrust his abilities: every man knows whether l has been admitted or not; but every man after he is admitte may not know whether he be legally removed, for that may l a matter of difficulty depending upon the power of the soci ty, and the validity, reasonableness and consideration of the by-laws; for a removal *de facto* can never be sufficient, ar it must appear to us, not only to be a removal for acting con trary to by-laws, but also for acting contrary to *good* by-law I do not think the case at bar is within the reason of the case e pressed *in terminis*.

But even admitting it to be within the intent of the act, y surely in the case of freehold we ought to be satisfied of th justice of that removal, by their shewing a power to make by laws, and every other step necessary to make a lawful removal and for want of this, as well as for want of jurisdiction of th cause, I think no consultation ought to go.

To which *Powys* J. agreed. *Et per Eyre* J. If this had been return to a *mandamus* to restore, I should have thought it ill but there is a great difference, where the point of removal i only a collateral matter. The intent of this statute was cer tainly to secure the pilotage of ships to skilful persons, and th understanding of the pilot was the principal thing they had i view: now can it be said, that this man is *less* a person examine approved and admitted, by being removed? Does that tal away all the knowledge he had before? One cannot infer a incapacity from his being removed, for that might be for a matt foreign to the qualifications of a pilot. If the Parliament h intended any thing of that nature, surely it would have bee mentioned.

Fortescue J. The act itself makes a distinction between qu lified persons and those who are actually members. The publi is only concerned to see that they who undertake the pilo age of ships are capable of the business; which they ce tainly are, when they have passed examination. This act is be considered strictly, and not by equity; for it was never sai that this court shall construe an inferior court into a jur dictio

diction. The admission is good to some purposes after a removal, as 1 *Roll Rep.* 81. in the case of a *pauper* dispaupered. *Per curiam*, Judgment for the plaintiff. See 5 Bur. Rep. 2602.

The society applied, and had a clause in 7 *Geo. c.* 21 § 14. for their relief. 7 G. c. 21. s. 14.

Dominus Rex *versus* Philips.

THE coroner's inquisition taken *super visum corporis* was quashed, because the year of our Lord in the caption was in common figures, whereas it ought to have been in words at length, or at least in *Roman* numerals. Caption in common figures, ill.

Dominus Rex *versus* Johnson.

Mich. 6 Geo.

CONVICTION on 5 *Ann. c.* 14. for keeping a gun not being qualified; and exception was taken by *Fazakerly*, that here was not a reasonable summons, for it was made on 5 *October* to appear the same day, which might be impossible upon account of distance, or the summons being served late, and his witnesses might not be got together on so short a warning: then it is to appear *apud paroch' praedict'*, whereas there are two parishes mentioned before, so the man may have gone to one, whilst they were convicting him at the other. *Salk.* 181. Appearance cures defects in summons.

Wearg contra. The defendant appeared at the time and made defence, so that cures all defects in the summons. *Et per curiam*, The answer is right.

Then it was objected, that the statute requires the conviction to be by justices of the county where the offence was committed, and that does not appear in this case. *Et per curiam*, That must appear, or else they have no jurisdiction. *Et per Wearg*, It does, for they distribute part of the penalty to the poor of the parish of *Chesfield in com' Kanc', infra quam paroch' offensum praed' commissum fuit.* And the justices are justices of the county of *Kent*, and stile themselves so. *Adjournatur.*

Mich. 7 *Geo.* it was quashed; for *per curiam*, their jurisdiction must appear otherwise than out of their own mouth.

Between the Archbiſhop of Dublin *and* the Dean of Dublin.

Coſts ſhall be given on quaſhing writ of error, where there are none to be recovered in the action.

THE defendant in prohibition obtained judgment in *Ireland*, which was affirmed in *B. R.* there, and came over hither by a defective writ of error, which was quaſhed; and now the queſtion was, whether the defendant in error ſhould have coſts, there being none given in the courts below, either on the principal judgment or the affirmance.

And for the plaintiff in error it was ſaid to have been the conſtant conſtruction on 3 *H.* 7. *c.* 10. that where there were no coſts in the original action, there ſhould be none on the writ of error; and the 4 & 5 *Ann. c.* 16. extends only to caſes where the defendant in error would have coſts on affirmance. *Cro. Car.* 425. In a *formedon* the judgment was affirmed without coſts. So 1 *Lev.* 146. in a *quod ei deforceat*, 1 *Ven.* 166. in the caſe of an adminiſtrator, (and 4 *Mod.* 7. in replevin denied to the avowant) and the reaſon given for the caſes before cited is, becauſe there were no coſts in the original action; and the words in 3 *H.* 7. *delay of execution*, are confined to ſuch judgments, where there are coſts and damages. 1 *Ven.* 88. in the caſe of *Harriſon* and *the Archbiſhop of Dublin*, 10 *Ann.* in prohibition, there was judgment for the defendant in *C. B.* in *Ireland*, that judgment affirmed in *B. R.* there, and alſo in this court, and in the Houſe of Lords, and no coſts ventured to be taken, though able counſel had conſidered the caſe.

On the other ſide it was ſaid, that though there are no coſts given below in this caſe, yet there might have been coſts on 8 & 9 *W.* 3. *c.* 11. (which they ſhewed was enacted in *Ireland*) and therefore the neglect of taking them in one court ought not to prejudice the party in another. In *Cro. El.* 659. there were coſts in a *quod permittat*, and yet the judgment is, only to abate a nuſance, *Harriſon's* caſe paſſed *ſub ſilentio*; and in *Hyde* v. *Hallagan*, *Hil*, 2 *Geo*, *in B. R.* which was replevin in *C. B.* in *Ireland*, judgment for the avowant, and affirmed in *B. R.* and brought over hither; and becauſe the firſt writ of error from *C. B.* to *B. R.* was defective, this court reverſed the affirmance, and gave ſuch a judgment as *B. R.* below ought to have done, *viz.* to quaſh the writ of error, and after ſeveral motions coſts were ordered to be taxed.

C. J. The authorities on 3 *H.* 7. being both ways, I think myſelf at liberty to go into thoſe which ſeem to me to be grounded on the beſt reaſon, and thoſe are ſuch as give coſts, for

For indeed the others which are built upon the words *delay of execution* ſtand upon a very ſlender foundation. Suppoſe there were no coſts in the original ſuit, yet is there not a manifeſt delay to the party? for after a long race, when he reaches a conſultation, he is but in the ſame condition, as to the forwardneſs of his ſuit in the inferior court, as when he firſt ſet out to defend himſelf againſt the prohibition. The defendant might have had coſts below if he had aſked for them, and I think he is intitled to them here. *Et per Forteſcue* Juſtice: Coſts and damages will lie in ſome prohibitions. *Cro. Car.* 559. *Cro. Eliz.* 617, 659. The ſtatute has the word *vexation* as well as *delay of execution*, and will any body ſay, here is not a manifeſt vexation to the party, to be travelled thus far from one court to the other, and to have the merits of his cauſe ſo long ſuſpended from being determined in the inferior court.

Curia adviſare vult; and *Trin.* 6 *Geo. Pratt* C. J. delivered the opinion of the court, that coſts ſhould be paid.

Dominus Rex *verſus* Whitlock.

THE defendant being brought up from *Newgate* by *habeas corpus*, it appeared upon the return, that he was committed for deer-ſtealing, as the ſtatute 3 & 4 *W.* & *M. c.* 10. directs, not having ſufficient diſtreſs; and that this was done by one juſtice under the ſtatute 5 *Geo.* and two exceptions were taken to the warrant. Conſtruction on ſame act of 5 Geo. c. 15.

1. Becauſe it does not appear, the conviction was ever confirmed in this court, or that the rule for confirmation was delivered to the juſtice, and the words of the ſtatute are, "That "*after* the confirmation of any conviction and *delivering the* "*rule* to the juſtice, it ſhall and may be lawful, &c." Now this ſtatute gives the juſtice a juriſdiction after confirmation, which he had not before; and therefore he ought to ſhew every thing requiſite to found his juriſdiction, within the reaſon of the caſes on the ſtatute *Car.* 2. where orders have been quaſhed for not appearing to be *upon complaint* of the churchwardens or overſeers. So *Hill.* 4 *Ann. Regina* v. *Hinam*, a conviction on *Car.* 2. for ſelling coals by ſcanty meaſure was quaſhed, becauſe it did not appear to be done in the city of *London*. The word *after* makes what comes under it to be in the nature of a condition precedent, and imports ſomething previous to found the juriſdiction. 13 & 14 Car. 2. c. 12. 16 & 17 Car. 2. c. 2.

2. The juſtice only ſays, that it has been certified to him by the conſtable, that there was no ſufficient diſtreſs, whereas

 there

there ought to have been a warrant to levy, and a return to that, that there was no diftrefs: it may be the conftable only told him fo.

Et per Pratt C. J. and *Fortefcue* J. (*abfente Powys* J.) the warrant is well enough, for as to the laft objection, the word *certified* imports it be in a legal manner. Then as to the other objection, we take notice of our own records, and by them it appears the conviction is confirmed. The ftatute does not give the juftice a new jurifdiction, but only revives his old one which was fufpended by the *certiorari*, and therefore this widely differs from the cafe of an order of removal, for there the overfeers are in the nature of truftees for the parifh, and unlefs they complain, it is to be fuppofed there is no grievance, and it is likewife to give an original jurifdiction.

Eyre Juftice *contra*. The old jurifdiction was abfolutely taken away by the *certiorari*, and this is a new jurifdiction given upon terms, for the profecutor has his election to take a *levari* from us, or apply to the juftice, and the delivering the rule is what makes his election. We never grant execution on affirmances in the Exchequer chamber, till a *remittitur*. The juftice fhould likewife fhew a return, that there was no diftrefs, before he can order the man to be imprifoned; according to Dr. *Bonham*'s cafe and the cafe of *Rex* v. *Chandler*, *Hill.* 11 *W.* 3. *in B. R.* where it was held, that there muft be a record of every fining and imprifonment. There being two Judges to one, the defendant was remanded.

Salk. 378.

Dominus Rex *verfus* Furnefs.

Order for tithes. 7 & 8 W 3. c. 6.

ORDER for non-payment of fmall tithes was quafhed, *quia* faid only *upon complaint* generally, and the 7 & 8 *W.* 3. *c.* 6. requires the complaint to be *in writing*.

Poplewell *verfus* Wilfon.

Note to pay for the debt of another is within the ftatute 3 Ann. c. 9.

ERROR of a judgment *in C. B.* in cafe upon a promiffory note entered into by *A.* to pay fo much to *B.* for a debt due from *C.* to the faid *B.* And it was objected, that this not being for value received was not within the ftatute, and *prima facie* the debt of another is no confideration to raife a promife. But the court held it to be within the ftatute, being an abfolute promife, and every way as negotiable as if it had been generally for value received. And the judgment was affirmed.

Dominus

Dominus Rex *verſus* Clarke.

THE writ *de excommunicato capiendo* run thus? "*Signi-* *Excom' cap'.*
"*ficavit nobis* (the biſhop) *quod Johannes Pope* (the vicar
'general) in a cauſe between *A.* and *B.* for the contumacy
'of the ſaid *B. ipſum praefat'* B. *excommunicandum fore decre-*
'*viſſet authoritate ipſius epiſcopi ordinario excommunicatus fuiſſet.*"
And *Yorke* moved to quaſh it, becauſe the only nominative
caſe to *excommunicatus fuiſſet* is *John Pope* the vicar-general, ſo
he is ſaid to be excommunicated, and not the defendant. For
the ſentence is not enough to warrant this writ, but it muſt
be denounced in the church by a perſon in holy orders, and
therefore the *excommunicandum fore decreviſſet* (which I admit
goes to the defendant) is not enough.

Et per curiam: It is oddly penned. But the officer informing them, that moſt of the writs in the office were, and had been ſo, the court refuſed to quaſh it.

Dominus Rex *verſus* Smith.

IN this cauſe, and alſo in another againſt juſtices of the peace, the court refuſed the common rule for a good jury, becauſe that is often made up of gentlemen who are in the commiſſion. Practice.

Between the Pariſhes of Ivinghoe *and* Stonebridge.

UPON a ſpecial order of ſeſſions the caſe was ſtated for the opinion of the court. That in 1702 one *Richard* *Glover* was bound apprentice to *John Emerton*, who was legally ſettled in *Ivinghoe*: that he ſerved part of his time there, and then the maſter went with all his family as a certificate-man to *Stonebridge*, where he purchaſed an eſtate of the value of 60*l.* and after ſuch purchaſe the apprentice lived with him ſix months till the apprenticeſhip expired; and becauſe the ſtatute 12 *Ann. c.* 18. provides, that the apprentice of a certificate-man ſhall gain no ſettlement in the pariſh to which the maſter goes by certificate, therefore the juſtices adjudge the ſettlement at *Ivinghoe*, where the binding and great part of the ſervice was.

12 An. c. 18. Apprentice living forty days in a pariſh to which the maſter goes as a ſettled inhabitant gains a ſettlement. Seſſ. Caſ. 143. pl. 133.

Et per curiam: The order muſt be quaſhed: for as the apprenticeſhip expired in 1709, the ſtatute 12 *Ann.* is out of the caſe, not being made with any retroſpect; and then the caſe

2 is

is no more, than that an apprentice of a certificate-man forty days in *Stonebridge*, which before that ſtatute was er to gain him a ſettlement. But if this had been a caſe ſinc ſtatute, yet we think the ſettlement would be in *Stonebi*

Ante 163. for according to the caſe of *Burclear* and *Eaſtwoodhay*, 1 5 *Geo. in B. R.* when a certificate-man makes a purchaſ immediately ceaſes to be there in nature of a certificate- and becomes a ſettled inhabitant; ſo that laying the ſtatut of the caſe (as we muſt do, it being nothing to the pu in this view here is a ſervice for ſix months, as an appre in a pariſh where the maſter was legally ſettled, which is than ſufficient to give a ſettlement to the apprentice.

Dominus Rex *verſus* Hare et Mann.

Ante 146. King may try either iſſue firſt, where ſeveral are joined.

SCIRE facias out of the petty bag to repeal letters pa and Mr. Attorney moved on behalf of the crown trial at bar the next term, but as to the time was op becauſe it was alleged, that one defendant had pleaded to and as to the other there was a demurrer joined, which to the whole, ſo that if the demurrer ſhould be with that fendant, it would make an end of the *ſcire facias*, let the be determined which way it would; and 2 *Cro.* 134. 1 125. were cited. *Smith* v. *Bowen*, 8 *Ann.* In appea defendant pleaded to the writ, and at the ſame time (a might do in appeal *in favorem vitae*) he pleaded over to felony, and there being a demurrer to the plea to the that was ordered to be argued before any trial, becauſe ſ that be adjudged for the defendant, the other inquiry w be to no purpoſe. In treſpaſs, if there be two defend and one pleads Not guilty, and the other a releaſe, the of the releaſe ſhall be firſt tried, becauſe if that be true, it law a releaſe to both, and makes an end of the matter. In a a plea to the writ ſhall be tried before *Nul tort*, &c. A the caſe of the appeal there was a ſpecial entry, *quod quoad* iſſue of Not guilty *ceſſet triatio quouſque* the plea to the writ determined.

Paſch. 26. Ed. 3. pl. 2. 2 L. Raym. 1288.

To this the Attorney General anſwered, That thoſe were between party and party, and bound not the crown: the *venire facias* is returned and filed, ſo the effect of prayer is for me to make a diſcontinuance. *In C. B.* bet *The King* and *Roberts et al'*, there is now depending a wr deceit to reverſe a fine of lands in ancient demeſne; on fendant demurred, and the other pleaded in chief, that frank-fee: that iſſue is tried and found for the king, but demurrer is not yet determined, and yet that is a caſe qu the ſuit of the party, for the crown is only nominal, an concerned in intereſt. *Dy.* 226.

Et per curiam: There is no danger of a discontinuance, for if the *venire* be filed, the proper entry is, That the jury *ponitur in respect'.* If it be not filed, you may yet enter a *non misit Breve*, and either way will prevent a discontinuance. In the case of the appeal, the bare award, *quod cesset triatio quousque, &c.* was held to be a good continuance of the cause.

As to the principal point, it being the cause of the crown, the court took time to consider; and the last day of the term the Chief Justice delivered their opinion, That the Attorney General was at liberty to bring on either the demurrer or the trial, as he pleased. A trial at bar was ordered for the next term.

Arnold *versus* Johnson.

At Nisi prius *in* Middlesex, coram Pratt, post clausum termini.

THE cause was called, and the jury sworn, but no counsel, attornies, parties or witnesses of either side appeared. Serjeant *Whitaker*, being asked his opinion, said the plaintiff ought to be called, for the jury being charged, the cause must be carried on to some determination. But the Chief Justice said, that no body had a right to demand the plaintiff but the defendant, and therefore the defendant not demanding him, he could not order him to be called, but the only way was to discharge the jury. And Mr. *Ketelbey* remembered a case where my lord *Parker* did so upon the like accident.

None but the defendant can demand the plaintiff.

Mr. Ratcliffe's case.

Upon an appeal to the Lords Delegates from the judgment of the commissioners for forfeited estates.

SIR *Francis Ratcliffe* being seised in fee of the premisses in question, by lease and release dated 19 & 20 *March*, 1687, settled the same to the use of *Edward* his first son (afterwards earl of *Derwentwater*) for life, remainder to his first and every other son and sons in tail male, remainder to the right heirs of Sir *Francis*. Earl *Edward* the tenant for life died, leaving *James* his eldest son, who entered and was seised of the tail: and 1 *May* 1712 (being at that time a papist) he conveyed the premisses to two persons who were protestants, in order to make them tenants of the freehold, till a common recovery was suffered, which was according had and suffered of part of the lands

Tenant in tail may since the 11 & 12 W. 3. suffer a recovery to the use of himself in fee though he is a papist.
8 Mod. 167.
2 P. Wil. Rep. 5.
10 Mod. 89, 230.

lands *in C. B. Pasch.* 1712, and of the other part, lying in the county palatine of *Durham*, 19 *June* 1712. Both which recoveries were declared to be to the use of earl *James* in fee. Earl *James* being thus seised of the fee, by lease and release 23 & 24 *June* 1712, on his marriage with Sir *John Webb*'s daughter, conveyed the lands to the use of himself for life, then to the lady for life, remainder to the first and every other son and sons of that marriage in tail male, with several remainders over, and proper limitations to trustees to preserve contingent remainders. The marriage took effect, and the claimant Mr *Ratcliffe* was eldest son. Earl *James*, 19 *February* 1716, was
1 Geo. 1. c. 50. attainted of high treason, and by the statute 1 *Geo.* all estate tail, whereof persons attainted were seised, are vested in the crown in fee. The commissioners seize this estate as forfeited by the attainder of earl *James*, upon which Mr. *Ratcliff* puts in his claim, insisting that earl *James* was only tenant for life, and himself had now the right to his remainder in tail, the estate for life being determined by the execution of earl *James* 23 *December* 1718, the claim was disallowed, the commissioners being of opinion, that earl *James* was disabled by the 11 & 12
11 & 12 W. 3. c. 4. *W.* 3. *c.* 4. to suffer such recoveries, and consequently he remained tenant in tail under the settlement of Sir *Francis*, and so the crown is intituled to the fee. The claimant appeals to the Delegates from the determination of the commissioners.

It was argued several times at the bar on the behalf of the publick and the claimant; but there being a difference of opinion in the court, there will be no occasion to take notice of the arguments of the counsel, since every thing that was materially offered on either side is again repeated in the judgment of the court.

The Delegates were five of the Judges, (*viz.*) Mr. Justice *Powys*, Mr. Justice *Tracy*, Mr. Baron *Montague*, Mr. Justice *Fortescue* and Mr. Baron *Page*, who all delivered their opinions *seriatim*: and though four of these concurred in opinion to reverse the decree, yet they gave such very different reasons for that opinion, as makes it necessary to state each of their arguments at large, in order to shew the grounds they severally went upon.

The great question in this case is, whether a papist tenant in tail can, since the 11 & 12 *W.* 3. suffer a recovery to the use of himself in fee, for it was agreed on all hands, that if the recovery had been immediately to the uses declared by the subsequent settlement, it would have been good.

This

This general queſtion depends upon the conſtruction of the diſabling clauſe in that ſtatute, whereby it is enacted, "That "from and after the 10th of *April* 1700, every papiſt, or per- "ſon making profeſſion of the popiſh religion, ſhall be, and is "hereby diſabled to purchaſe, either in his or her own name, or "in the name of any other perſon or perſons, to his or her uſe, "or in truſt for him or her, any manors, lands, profits out of "lands, tenements, rents, terms or hereditaments within the "kingdom of *England*, &c. And that all and ſingular eſtates, "terms, and any other intereſts or profits whatſoever out of "lands, from and after the ſaid 10th day of *April* to be made, "ſuffered or done, to or for the uſe or behoof of any ſuch per- "ſon or perſons, or upon any truſt or confidence, mediately "or immediately, to or for the benefit or relief of any ſuch "perſon or perſons, ſhall be utterly void, and of none effect, to "all intents, conſtructions, and purpoſes whatſoever."

And if the recoveries be within this diſabling clauſe; then *nihil operatur* by the deed and recoveries, and the claimant's father remained tenant in tail as before, and the eſtate is forfeited to the crown. If not; then he became tenant for life by the new ſettlement, and the claimant has right to his remainder in tail, as limited to him by that ſettlement.

Mr. Baron Page's argument.

Mr. Baron *Page*'s argument. This is a caſe of very great conſequence, not only on account of the particular eſtate now in conteſt, which is very conſiderable, but alſo as it affects the ſtates of multitudes of papiſts, and proteſtants who have purchaſed under them, and as it is before a court from which there is no appeal.

I am of opinion that the claim of the appellant was well founded, and conſequently the decree of the commiſſioners diſallowing the claim is erroneous, and ought to be reverſed.

The great queſtion is, whether a papiſt tenant in tail can ſince the 11 & 12 *W.* 3. ſuffer a recovery to the uſe of himſelf in fee. This is the ſingle point to which it muſt all at laſt be reduced.

It has been inſiſted on for the publick, that by the words of the ſtatute the late Earl was incapacitated to ſuffer theſe recoveries; and to make the argument the ſtronger, it was urged that they were two diſtinct clauſes which have no relation to each other, and that the laſt carries the incapacity of a papiſt much farther than the firſt.

Whether they are two clauſes or one only, I ſhall not determine, ſince that is not material to guide us in the conſtruction, where

where the only queſtion is, whether the latter part is diſtinct from, or relative to the former. I think the words of both parts are relative to each other, and the latter only explanatory of the former: they are only different ways of expreſſing the ſame thing, in which one perhaps may in itſelf be of a ſtronger import than the other, but yet were intended by the legiſlature to convey the ſame ſenſe, only in a fuller light.

It was ſaid that unleſs the latter words are carried farther than the former, they will be entirely uſeleſs: but to ſhew that acts of Parliament are not ſo nice upon that head, but make uſe of different expreſſions as often to clear up their meaning in what went before, as to add new matter, I ſhall obſerve, that this very clauſe now before us is no new one amongſt our ſtatutes, but is uſed in ſeveral of them upon occaſions that ſhew they muſt be merely ſynonymous with what was ſaid before. Thus 1 *Jac.* 1. *c.* 4. § 6. makes perſons paſſing or ſent beyond ſeas into popiſh ſeminaries, incapable of inheriting, purchaſing, taking and enjoying any manors, lands, profits, goods and chattels whatſoever; but not content with thoſe words, it goes on and enacts, That all eſtates, terms and intereſts, (in the very words of our ſtatute) ſhall be utterly void and of no effect. And yet it is evident, theſe could not carry the incapacity of papiſts farther than the former words had done; ſince thoſe exclude him from all benefit whatſoever in any real or perſonal eſtate within the realm of *England*.

But what is more full if poſſible to our purpoſe is 25 *Car.* 2. *c.* 2. commonly called the *teſt act*, by which perſons elected into offices, and refuſing to take the oaths and receive the ſacrament, are made incapable "to take, occupy and enjoy the "ſaid offices or employments, or any part of them, or any "profit or advantage appertaining to them:" And yet the Parliament, to prevent any equivocation, and to make the matter plain to the *lay gents*, declares further, "That all ſuch "office or offices, employment or employments, ſhall be "void;" which no one will ſay can ſignify more than what was expreſſed in the preceding ſentence.

1 Ann. ſt. 1. c. 32. I ſhall mention but one ſtatute more, which is that of 1 *Ann.* concerning the purchaſe of the forfeited eſtates in *Ireland*, by which it appears how apprehenſive the Parliament was of the danger which might ariſe to the kingdom by a landed intereſt ſubſiſting in the papiſts, and therefore amongſt other things it was deſigned as a prevention of any of thoſe eſtates from ever returning into popiſh hands: for this purpoſe it enacts, "That "all papiſts ſhall be for ever diſabled to purchaſe any of thoſe "lands;" and further, "That all acts whatſoever ſuffered

"or

" or done of such lands to or in trust for any papist shall be " void." This statute seems to have been the very pattern of the act now before us, and though it is impossible to find any use for the latter words, not implied in the former; yet the legislature we see did not think it improper, to express their minds different ways, both with regard to the disability of the person, and the nullity of the acts done for his benefit, though they both in the end amount but to the same thing. Here was certainly no intention in the Parliament, to disable the papists from selling or disposing of their own estates: the restraint was only from purchasing and taking, and it was equal to them, who was the seller or disposer, whether the estate moved from a papist or a protestant: the papist was in all cases alike still disabled from being the taker.

Having now (as I think) cleared this case from any difficulty it might lie under upon account of the different wording of the statute, and shewn that no advantage can be taken against the claimant for the peculiarity of some expressions in the latter part, which were added by the legislature only out of abundant caution, and to prevent mistakes; I shall now proceed to shew, that according to the true intent and design of this statute, the late Earl was not restrained from suffering such recoveries as he did.

And the first thing I would set out with is to observe, that this is a penal law: it takes from persons what by the common law of *England* is their birth-right, and upon that account is to be interpreted strictly, and in such a manner as not to carry the penalty farther than the open and evident intent of the statute, which is a rule of construction that always has, and I trust ever will prevail.

Now the first and plain view of this law was, to prevent the great mischief that had been experienced from the power which the moneyed men amongst the papists had of increasing their landed interest in *England*, and consequently of investing themselves with a large share of power and influence in the country. To remedy this mischief, the statute provides, That for the future no papist shall make any new acquisition in lands; but there is not any word in it, that looks like a design to take from them their own estates, which they had before: as to those it meddles not with them, but leaves them where it found them; we should then at least endeavour to guard against any interpretation, that tends to the taking away or abridging their present estates, because in so doing we act most agreeably to the sense and meaning of the legislature.

Before the suffering these recoveries, it appears, the late Earl was tenant in tail: every estate-tail has this property insepa-

rably

rably annexed to it, that the poſſeſſor of it has a right to ſuffer a recovery. Should therefore this ſtatute be expounded in ſuch a manner, as to hinder the effect of a common recovery on a papiſt's eſtate-tail, it would be taking away one preſent right which he has as an inherent quality in his own eſtate, and ſo far extending the penalty and hardſhips of this law beyond its principal deſign, which I have before ſhewn had regard only to new acquiſitions, and being a penal law is to be conſtrued ſtrictly. I muſt therefore own myſelf at a loſs to find out the reaſon, why we are to thwart that ancient and conſtantly allowed rule of conſtruction, by going out of the words, and in my opinion out of the intent, of the ſtatute. That the power of ſuffering a recovery is incident to an eſtate-tail, I believe will not be denied: *Mildmay*'s caſe, 1 *Co.* and 6 *Co.* 40. are full to that purpoſe; and there it is ſaid too that all conditions to the contrary are void, and that a tenant in tail has the power over, though he has not the whole fee-ſimple in himſelf.

So the caſe of *Benſon* v. *Hodſon*, 2 *Lev.* 26. 1 *Mod.* 8. where Lord *Hale*, accounting for a recovery's being a bar to the remainder man, ſays, that a recovery is a conveyance or method of defeating thoſe limitations, excepted out of the ſtatute *de donis* which never intended to hinder it, and that the recompence in value is not the reaſon why the remainder man or reverſioner is barred.

But as an anſwer to all this it is urged, that how true ſoever is, that the Earl was ſeiſed in tail, and the power of ſuffering a recovery is the right of every tenant in tail; yet the ſtatute we are now upon has in fact ſeparated this eſtate and that right: they are to take the ſtatute as they find it, and then it has ſufficiently deprived him of the power of ſuffering a recovery, by diſabling him from purchaſing.

The ground of this argument is, that the deſtruction of that eſtate-tail by the recovery, and the taking an eſtate to himſelf in fee, is a purchaſe within the meaning of the ſtatute.

Now conſider the analogy between common ſenſe and this conſtruction: would it not ſurprize a man who aſks who you purchaſed your eſtate of, to be told you purchaſed it of your ſelf: whoſe was it before? why it was mine, and I purchaſed it of my ſelf. Would not a perſon unacquainted with the chicanery of the law think you deſigned to banter him by ſuch an anſwer? And I believe the Parliament never thought of ſuch a purchaſe, where the ſame perſon is both donor and donee, grantor and grantee.

I agree

I agree it was the intent of the ftatute in general to prevent the acquifition of eftates by the papift; and therefore if there is a deficiency of any words which might directly comprehend them, we may fupply it for that purpofe. Thus I take a devife to be within the ftatute: or if a papift fhould be fuffered to diffeife another, and then gain a releafe from the diffeifee; or where he is tenant for life fhould levy a fine and the five years fhould pafs: in all thefe cafes, or any other of gaining any eftate or intereft in lands which he could not have purely by his own act, and without the procurement or connivance of the perfon whofe right is loft, I take it he will be difabled by the ftatute. But I can go no farther, this being in my opinion the utmoft extent that either the words or meaning of it can bear: and if we fhould attempt to carry it further, the mifchief aimed at will not be prevented but increafed; the popifh intereft, inftead of being leffened, will be confiderably advanced.

For I cannot but think the effect of fuch a conftruction will be, to fix a perpetuity to the eftates of all the papifts in *England*; and inftead of removing by degrees all the landed intereft out of popifh, into proteftant hands, it will tend to keep it entirely amongft the *Roman* catholicks: for to make a papift incapable of fuffering a recovery, equally hinders the fale to a proteftant, or a papift.

Or fhould the latter part of the ftatute be interpreted in the utmoft latitude the words will allow of, and as a disjoined and feparate claufe from the former; confider what abfurdities we muft run into that way. All acts for his benefit or relief are made void; and therefore I cannot but think thofe words, when ftretched as large as fome people would have them, will prevent even a fale to a proteftant, fince no man can be fuppofed to part with his eftate to a ftranger, but in view of fome benefit to himfelf. But I hope it will never be pretended, that the Parliament defigned any fuch thing by that expreffion, when it is evident the ftatute was calculated to enforce and oblige papifts to fuch a fale.

But if we muft interpret the word *purchafe* here, not according to common underftanding (which one would imagine acts of Parliament were moft calculated for) but in its legal fenfe, in oppofition to taking by defcent; yet then I fay, the Earl was feifed under this recovery much more in the way of a defcent than a purchafe. For this purpofe it is to be obferved, that by the firft fettlement Sir *Francis* became tenant for life, with a reverfion in fee to himfelf after the eftate-tail, of which the late Earl was feifed before his fuffering the recoveries, fhould be fpent. This reverfion in fee defcended on the late Earl at the fame time the eftate-tail came to him, and he

continued seised of both till the recovery. Now what effect had the recoveries on these estates? why as to the tail, it extinguished that, but could not touch the fee; the consequence of which was, that all the impediment being removed, he was then in possession only of that ancient reversion in fee, which descended to him from his grandfather. 4 *Mod.* 1. the case of *Symonds* v. *Cudmore*. Tenant in tail with a reversion in fee makes a lease not warranted by the statute, and dies, the issue before entry levies a fine; and it was held, that the lease was good, for this reason, because the tenant in tail by levying the fine did not carry off the estate-tail so as to avoid the lease but only extinguished it, and so was in as heir at law to his father of his reversion in fee, and must therefore take that estate together with the father's charge upon it.

Now suppose the late Earl's father had made such lease and died, and the Earl before entry had suffered a recovery, would not this have let in his father's incumbrance? or can there be any difference whether the tail be extinguished by fine or recovery? Whatever act it is, that, by removing the intermediate estates, lets in the reversion, it is exactly the same thing: the incumbrances on that reversion, and the incidents to it, must be let in too. And therefore if the Earl had been originally seised *ex parte materna*, he would have been in of the fee on the recovery on the same side.

Common recoveries, it is well known, are only as common assurances, to be interpreted in the same manner, and to convey a title in the same condition, as other conveyances do. Now if one seised in fee enfeoffs *J. S.* to the use of himself for life, remainder to the use of the feoffee in fee; the feoffee is in only by way of remainder, and not of the reversion as the residue of the estate which was in him as feoffee. 1 *Inst.* 22. *b.* *Dyer* 361.

The law looks upon the deed to lead the uses and recovery as both together making one conveyance; and therefore when it happened, that the person to whom a conveyance was made in order to make a tenant to the *praecipe*, was also lessee for years of the same land; it was adjudged in the case of *Fountain* v. *Coke*, 1 *Mod.* 107. that the lease was not extinguished, as it would have been in any other case; because the law considers the recovery with all its appurtenances but as one conveyance, and each of the instruments to bring it about but a part of it.

What I have been saying now to prove that Earl *James* was in under the recovery rather by descent than by purchase, is supposing it to be true, that all are seised of their estates either by descent or purchase. But indeed I think there is another

wa

way of coming to an eftate, and that is by operation of law, as in the cafes of tenant by the courtefy, dower, and the lord by efcheat: in each of which there is nothing either of purchafe or defcent, but the law cafts the eftate on the hufband, the widow, and the lord, without any act of their own, or prior feifin of their anceftor. And under this rank, perhaps, we may place the eftate gained by the late Earl under the recovery: he is not feifed of any new or really different eftate from his firft tail, for the tail and fee are in law equal eftates, and therefore capable of being exchanged. 1 *Roll. Abr.* 813. But by the means of this recovery the operation of the law has new moulded it, and put it in a different form from what it was before.

The fum of what I have faid under this head is, that he is not in by purchafe (taking it in the legal fenfe) which is prevented from having any effect by the ftatute: but he is in either by defcent or operation of law; both which are confeffedly not within the ftatute.

But then the objection recurs from the latter words of the ftatute, which, fay they, are general, and extend to his own acts; that the law doth not regard from whence, but to whom the eftate comes; and therefore let the act be done by the papift himfelf, or by any other; if thereby any eftate or benefit accrues to the papift, it is made void.

But firft, had the ftatute intended the papift's own acts, it would have been natural, to have mentioned any acts fuffered or done *by* him, whereas the words are only *to* or *for*, which can never include *by*; for *to* is no more than *to himfelf*, and *for* implies *to another* for *himfelf*.

But in the next place, let us confider the confequences of fuch an extenfive conftruction. The act fays, "Any thing "done for the benefit or relief of a papift fhall be void." Now let thofe words be but underftood in their full extent, to mean all acts done by himfelf or others in relation to his eftate, that are for his benefit; and I may venture to fay, they will not leave him even the leaft mark of ownerfhip in that which is confeffedly his own land. Plowing and fowing, making leafes (which infants are allowed to do as what is beneficial to them), mortgaging, though to a proteftant, or felling in order to raife money to redeem himfelf from flavery, will all come within the comprehenfive meaning now fet up of the words *benefit and relief*; for not one of thefe acts but are in fome meafure done with a profpect of his benefit or relief.

I mention thefe, not as things infifted on *in terminis*, but what muft follow as a confequence of leaving the main defign of the ftatute, to find out an expofition moft to the embarraffment of papifts. For I am bold to fay, the Parliament never thought of carrying matters to fuch a length: nor can it be imagined, that a papift tenant for life, with a power of committing wafte, is by this act debarred from fo doing, and made incapable of digging mines, cutting ftone, and the like, and yet this is a ftronger cafe than ours, fince it is to the difherifon of the reverfioner.

Agriculture is much favoured and encouraged by the law, whereas we are now inventing a method, how all the lands in the hands of papifts muft lie for ever uncultivated.

The cafe moft relied on by the counfel for the publick was that of *Roper* v. *Radcliffe*, which was adjudged upon an appeal to the Houfe of Lords, where an eftate was devifed to be fold for payment of debts and legacies, and the furplus to go to a papift; and the devife of the furplus was held void upon the prefent ftatute, as being an intereft and profit out of lands.

But I muft own my inability to find how that cafe has any relation to this before us: I am fure it is very confiftent with my interpretation of the word *purchafe*: it was an intereft out of land, not his own but another's: and this was fuch a profit, as gave him as full a power over the land, as if it had not been directed to be fold, but devifed to him chargeable with debts and legacies; for he might (if a proteftant) have come into a court of equity, and compelled the truftees to convey to him on payment of the debts and legacies: this therefore was to all intents a devife of another's land, which I have before admitted to be within the ftatute.

But fay they, confider what you are doing: are not you giving a papift tenant in tail in poffeffion a power to bar a proteftant remainder-man: and does not this tend to keep the land amongft the papifts, inftead of drawing it to the proteftants? Does not this enable the anceftor to keep the heir fteady to his own religion, for fear of being difinherited? And is not this a ftrengthening of the popifh religion?

To this I anfwer: That it is but a vain terror, and can follow no more this way, than that which is admitted on all hands would have been good. For did not every body agree, that if the recovery, inftead of being to the ufe of Earl *James* in fee, had been immediately to the ufes declared by the

ıe fubfequent fettlement, then every thing would have been ;ght, and as it fhould be? And where is there any effential ifference between the two methods of new moulding the eftate? The argument of mifchief holds both ways: nay, it is uniерfal in one, and but particular in the other; for I am apt to hink nobody who has the fettling of *Roman* catholick eftates or the future will ever follow the precedent of this cafe.

Whether this recovery was fuffered really in order to make he fettlement on marriage, or whether we can take notice of t as fuch, I do not think it very material. It is true, it is not exprefsly averred to have been for that purpofe, but yet there s *teftimonium rei* that it was, for the *Durham* recovery was 19 *June* 1712, and the releafe is dated the 23d, which was as foon as a letter could come to *London* to fignify that the recovery was fuffered.

Upon the whole I am of opinion, it never was the intention of the legiflature, to deprive Earl *James* of any right he had to his own eftate. Being tenant in tail, he had a right to fuffer recovery and new mould his eftate. He has done fo, and raifed a good right in Mr. *Ratcliffe*, whofe claim I think was well founded, and ought to have been allowed.

Mr. Juftice *Fortefcue*'s argument. I fhall make two queftions this cafe. 1. Whether this conveyance is a *purchafe* within e act. 2. If it fhould not come under that ftrict notion of e word *purchafe*, whether it is not affected by the latter part the ftatute, which fpeaks of all acts fuffered and done to or r the benefit or relief of a papift. Mr. Juftice *Fortefcue*'s argument.

As to the firft; I take it for granted, that he who takes by urchafe, is a purchafer; and the confideration is not material, has been allowed by my brother; and in the cafe of *Roper Radcliffe* it was agreed, that there was no diftinction between king by purchafe and being a purchafer. Let us then fee what is to take by purchafe. *Litt.* § 12. fays, He takes by purhafe, who comes to lands by his own act and agreement, and t by defcent. The oppofition between purchafe and defcent, , that the former is the effect of a man's own act; the latter, e act of law, without, and perhaps againft his own act. The eaning of defcent is not confined to that particular cafe where ds come down from the anceftor to the heir; but wherever : freehold is vefted in any perfon by the act and courfe of r, fuch perfon is in, in nature of a defcent. 1 *Inft.* 18. *b.* uft therefore differ from my brother as to his notion of tenant the courtefy, dower and efcheat. Tenant by efcheat is faid come in as heir, *in loco haeredis*. *Bro. Efcheat* 33. where the

the lord's taking by eſcheat is put upon the ſame foot with the heir's taking from his anceſtor.

The ſame is to be ſaid of tenant in dower and by the curteſy: and I never till now heard of that third ſort of taking eſtates, which my brother calls taking by operation of law, as diſtinguiſhed both from a purchaſe and deſcent. Lord *Coke* indeed does mention a third ſort by creation, but that is foreign to our caſe, and may beſides be very properly referred to the head of purchaſe.

If the act of law concurs with the act of the party, it is a purchaſe. If the act of law only works the veſting of the eſtate, it is then a taking by deſcent. This is the caſe of the recoveror. He is in, it is true, by operation of law, but his own act is that which firſt gave motion to it, and conſequently he is in by purchaſe. No one would doubt where the recovery is to the uſe of a third perſon, but that he is in by purchaſe, and yet he too is equally in by operation of law. The late Earl then was within the expreſs words of *Littleton*, for he not only took by operation of law, but in conjunction with his own act and deed executed.

But we are told, this is only the *legal* ſenſe of the word: there is another vulgar ſenſe more intelligible to the underſtanding of the generality of the world, and the ſtatute is to be intended in that ſenſe.

I muſt own this is the firſt time I ever heard, that Judges are to lay aſide the legal ſenſe of a law, and run about to find the meaning in which it is received by ruſticks and plebeians. The word purchaſe has a known ſignification, in which it has conſtantly been uſed by lawyers without any variation: and I can never ſuffer myſelf to go from that, without an expreſs direction in the body of the ſtatute.

It is ſaid this is not a purchaſe, why? becauſe he took no new eſtate, but was in only of his ancient uſe. What eſtate had he before the recovery? Only an eſtate-tail with a diſtant remainder in fee, after ſeveral intermediate remainders in tail to the ſecond, third, and other ſons: What eſtate has he now by the recovery? One ſingle fee-ſimple in poſſeſſion; that is, the ſeveral particular eſtates that were before partly in him and partly in others, are now joined together, and made one in him alone. Now can any one ſay, that the whole is the ſame with ſome of its parts? Or that he has the ſame eſtate now he has every thing in him, as he had when others ſhared it with him?

But

But then again the objection is altered, and we are told, that the recovery only removes the impediments, and leaves him in, juſt as he was at firſt. Be it ſo; he ſtill gains a new hereditament, which he had not before; and it amounts to the ſame thing, whether this is effected by taking away the incumbrance, or adding ſomething new. In numbers every one knows the removing a ſubſtraction is making an addition.

But to prove that he was in of his old eſtate in fee-ſimple, ſeveral caſes have been cited. The caſe of a feoffment to the uſe of the feoffor for life, remainder to the feoffee in fee, is very little to the purpoſe. It is grounded on what is ſaid in 1 *Inſt.* 23. that whoever is ſeiſed of an eſtate, has both the eſtate of the land, and alſo the uſe or the right to take the profits; and therefore ſo much of the uſe as he does not diſpoſe of, continues ſtill in him as his old eſtate, and ſo ſhall go to the part of the mother from whence the eſtate originally moved. But all this goes on the ſuppoſition of a preſent fee-ſimple in the feoffor, which in our caſe is removed to a great diſtance, after the determination of ſeveral other eſtates.

Another caſe urged with as little reaſon, is that of *Symmonds* v. *Cudmore*; where tenant in tail with an immediate reverſion to himſelf in fee makes an unwarranted leaſe and dies, the iſſue before entry levies a fine; and held he ſhall not now avoid the leaſe. But this is diſtinguiſhed from the preſent caſe by the ſame difference as the former: the reverſion in fee was immediately in him after his eſtate-tail, ſo that he really had the whole eſtate in the land in himſelf, only it was cut into two parts. But here the eſtate-tail in poſſeſſion and the fee in reverſion are disjoined by the intermediate remainders in other perſons, who conſequently take off part of the whole inheritance. All that this caſe amounts to is only to prove, that where a man has two eſtates in him, a leaſe which he makes is iſſuing out of both, and therefore when one of them is ſpent, or any ways removed, it ſhall be ſerved out of the other.

A caſe was cited upon the argument, where tenant for life with contingent remainder in tail, remainder to the tenant for life in fee, makes a feoffment to the uſe of himſelf in fee; and held that this uſe in fee was only his old eſtate. Now there is no doubt but that this muſt be his old eſtate, for he was all along ſeiſed of the fee-ſimple, liable only to be opened upon a contingency: all that the feoffment did, was making the contingency impoſſible ever to happen, and ſo incapacitates the perſon who was to be the taker; but this makes no addition to the eſtate;

it only makes that eſtate abſolute in the tenant, which bef was liable to be broke in upon and interrupted.

When a fee-ſimple conditional and an abſolute one m they are conſolidated. *Hob.* 223. *Salk.* 338.

The caſe of the Earl of *Lincoln*, *Show. Parl. Caſes* 154 ſtronger than this. There *Edward* Earl of *Lincoln* ſeiſed i made his will, and deviſed the lands in queſtion to the pl tiff; afterwards by leaſe and releaſe he conveyed them to the of himſelf in fee till an intended marriage ſhould take ef and then to the common marriage uſes. The marriage n took effect, and he died without iſſue or other diſpoſitio the premiſſes. The queſtion in Chancery was, whether conveyance was a revocation of the will, and held there t ſo: and the decree was affirmed in the houſe of Lords, bec the eſtate in fee gained by the conveyance was not the ol tate which the Earl had in him before, it being limited a different manner, and to be determined on a certain qu cation. Now if this variation of the eſtate was ſufficient tc ſtroy his old eſtate, and put him into a new one; there is n more reaſon here, the late Earl of *Derwentwater* ſhould be judged in of a new eſtate, when it is agreed here is an alter of his eſtate, and it is ſo great as to vary the very cour deſcent, which is certainly a mark of a different eſtate.

It has been ſaid, here is a vendee without a vendor: this is only a gingle of words. In the caſe of a deviſe, t is a *purchaſe*, as my brother admits, but nothing of a vend the caſe. If the words vendor and vendee cannot be made u the law ſupplies other relative words that are as much tc preſent purpoſe; there is deviſor and deviſee; and in our c do not ſee why *recoveror* and *recoveree* may not be uſed, w may anſwer the ſame end, and be applicable according tc different kinds of purchaſe.

In ſuppoſition of law the recoveror is in by purchaſe has gained an eſtate from the tenant in tail, which he ha before, and the tenant in tail has by intendment of law a re penſe in value for it; and the fee which is recovered, is thing of that eſtate which was in the tenant in tail; it i derived from him, nor can the recoveror make his title t him. This appears evidently from the ſtatute of 7 *H.* 8. which was made on purpoſe to remove an inconven that aroſe from this want of privity between the reco and the tenant in tail. By that ſtatute the recovero power given him to avow and juſtify for the rents, ſer and cuſtoms reſerved, in the ſame manner as the tenant i

I

might have done, which ſuppoſes he could not have done ſo before: and that ſtatute had been uſeleſs, if the recoverors had been in of the ſame eſtate which the tenant in tail had before, for then, according to *Doct. & Stud. c.* 26. *Co. Litt.* 104. he might avow and juſtify under his title. But the recoverors do not affirm the poſſeſſion of the tenant in tail, from whom they recover, nor claim by him; but rather diſaffirm and deſtroy his eſtate: and therefore they cannot allege any continuance of their title by him. So that the recoverors do not come in by the *per* or *cui*, but in the *poſt*, and conſequently are ſeiſed of a very different eſtate from the tenant in tail.

The reaſon why the remainder-man has no part of the recompenſe in value upon a recovery is, becauſe that recompenſe is a fee, upon which no remainder can be limited.

To conclude this head, I think if the old fee cannot take place, ſo as to make him tenant in tail at the time of his attainder; then the new one muſt, which I hold to be a purchaſe, and as ſuch made void by the act.

But as the ſecond point, whether the eſtate of the late Earl be not within the latter part of the ſtatute, an intereſt ariſing to him by virtue of ſome act or thing had, done, or ſuffered for his benefit.

It has been ſaid by my brother *Page*, that this latter clauſe ought to be tied up to the former, and as intended to take in nothing more than what was before comprehended under the word purchaſe.

But firſt here are no words by which this is referred to the foregoing part. In the next place I muſt obſerve, that the latter words are more general than the former; and though ſometimes ſubſequent particular words do reſtrain more general ones that precede, yet I never heard that general ones that come after were reſtrained by particular ones that preceded. Should we interpret this ſtatute in the manner my brother is contending for, we ſhould render the moſt common form of ſpeaking and writing vain, where a perſon that would take in every thing begins with enumerating particulars, and then leſt any thing ſhould have eſcaped him adds the moſt general words he can think of to ſupply all poſſible deficiencies.

The firſt clauſe diſables the party to purchaſe, and the ſecond makes all eſtates, *&c.* for his benefit void. But if the latter words are to ſignify purchaſes only, there could have been no need of them, it being preciſely the ſame thing to diſable the party to purchaſe, and making his purchaſe void. I ſhall give you

you two inftances of this: the firft is *Rex* v. *Corporation of Portfmouth*, on the 13 *Car.* 2. *c.* 1. § 12. which enacts, That no perfon fhall be elected into any office, that fhall not have taken the facrament; and every perfon elected fhall take the oath, and in default thereof fuch election fhall be void. I objected that the words *in default thereof* were to be underftood only of taking the oaths, and not the facrament; but the court faid that could do us no fervice, becaufe the incapacity of being elected which was created before in thofe who had not received the facrament was the fame thing as making their election void, and fo there was no occafion for thofe latter words. The other inftance is that of *Magdalen College* cafe, where by ftatute all leafes and grants by that college are made void, and it is there adjudged, that this is the fame thing as difabling them to make any grants or leafes. 1 Co. 66.

I can eafily admit thefe latter words to be explanatory of the former, but ftill in fuch a manner as to carry the difability farther than thofe did: for the legiflature confidered, that there were feveral ways by which papifts might come to eftates, which would not come under the notion of purchafe, though equally within the mifchief it intended to remedy; and therefore, that they might be fure not to leave any part of the danger unguarded, added thofe latter words, in order to take in all which the former would not.

In our cafe indeed the ftatute does not fay, the conveyance to a papift fhall be void, but the eftate fhall be fo: this amounts to the fame thing as a leafe to a monk for life, remainder over in fee, the whole deed is void, becaufe it can have no effect unlefs it paffes the particular eftate, that being neceffary to fupport the remainder. 9 *H.* 6. 24. *b.* *Bro. Grants* 133. But if the conveyance can have another effect, the deed fhall be good to that purpofe, though the particular eftate be void: thus a devife to a monk for life, remainder over is not void; though the monk cannot take, it fhall be good for the remainder-man. But in the prefent cafe the recovery itfelf is void, becaufe it can have no other effect but to pafs an eftate to a papift, and fince the recoverors cannot take for his ufe, they cannot take at all.

The matter therefore may be reduced to this dilemma. Either the eftate-tail is barred, or it is not barred. If it is barred, the fee is in the recoverors, and the fame moment in Lord *Derwentwater*. If it is not barred, then the tail continues, and confequently is forfeited by his attainder.

My brother calls this a relative claufe, but I can find but one word of that nature in it, which is *fuch*, and that has nothing

nothing to do with purchasers, but is used only to shew that the same persons (papists I mean) are concerned in this as well as the former clause. Indeed there are other words in it, which can have no relation to purchases, such as the words *trust* and *suffered*.

It was said the word *suffered* may be understood of suffered by disseisin: though I should allow of this, yet it does not follow that it does not extend to common recoveries too. In truth the word is applicable to both cases, and many others: as in *Magdalen College* case, where the words of the statute are the same as here, and held that a fine and non-claim is within the word suffered: otherwise it would be to no purpose to prevent alienations, if by suffering a fine to be levied, and five years to pass without claim, the estate might be passed.

Now let us consider whether the interest gained by this recovery suffered by Lord *Derwentwater* himself, is not to the purposes of this act the same as if he had gained it under a recovery suffered by another. I think it is: it is an act by which he procures to himself a larger and more valuable estate than he had before, and he gets it too by taking away from another person, as *Doct. & Stud.* expresly says, he gets what he has from the remainder-man. It makes no difference, that all this acquisition is only in the same lands; for a larger and better estate in the same lands is all one in this respect, as a new acquisition of new lands from a stranger. Thus where one devised lands to *J. S.* for life, *and all other my lands to* B. it was held, *All.* 28. 1 *Lev.* 212. that the reversion of the lands before devised to *J. S.* for life passed, because a further interest in the same lands was construed by law as so much new land.

Suppose the remainder-man had conveyed his right to the late Earl; can any one doubt whether this had been a new acquisition within the statute? Now where is the difference, whether he gains the same thing by his own act, or the act of another? It is equally in both cases a new hereditament, which he has acquired in the same lands, and that is the same as other lands. 2 *Ven.* 286.

It is said that this statute had no intention to take any thing away from the papists which they had, but only to prevent their having any more lands, and that to suffer a recovery is a power and right inherent in every tenant in tail.

To this I answer, The statute does not (nor does my argument need it should) restrain a papist from suffering a recovery to the use of a protestant. But whether it intended to take away this power, when it is to be used for the benefit of a papist,

a papist, is the question. To say there is no express intentio to prejudice the present right of papists to their estates, is o no weight; because whatever is comprehended under the ge neral incapacity put upon them by the statute, has the sam force as if it was actually named; and I think I have proved that the present case is so.

It may be said that the Parliament intended not to take awa any right from protestants, but yet we see it does, for it pre vents their selling to a papist, who may offer more for it tha
1 G. 1. c. 50. another. So in the statute 1 *Geo.* against traitors, it was fa from the principal design of that statute to injure good subject and protestants, and yet it has taken away a real interest fro them, for it vests all estates-tail of traitors in the crown in fee, whether the remainder or reversion be in a protestant or a papist; it is the consequence of the statute, and it cannot be helped.

But to make this objection the stronger, it is said, that this right of suffering a recovery is so closely connected with the very estate of a tenant in tail, that it cannot be taken away by a condition.

I agree such a condition generally is void, but not where it restrains the alienation to a particular person. This is our very case. The suffering a recovery is left open for the use of protestants, but restrained only as to a particular sort of persons. Whether a recovery by a papist tenant in tail to his own use, is not one suffered for the benefit of a papist, as well as where it is suffered for the use of another papist, is a question not at all affected by this objection: nor does the statute regard whether it be *by* a papist, as my brother imagines, but if it be *to* or *for* a papist it is sufficient.

I would now consider whether the law has not some known species of incapacity, under which the case of the papists upon this statute may be ranked. I think it has. Capacity and incapacity to purchase have been long known in our law, and signified certain precise conditions or circumstances of persons, which lawyers have been at no loss to determine. When this statute therefore incapacitates certain persons to purchase, it must be understood to put them into the same condition in this respect, as those were in whom the law formerly took notice of as incapable of purchasing; such as monks and other religious persons. And the Parliament seems to have had their eye upon these sort of persons, and to lead us to make this comparison, in using the same form of expression to describe the incapacity in this statute which is made use of in the 31 *H.* 8. *c.* 6. which enables monks to purchase after deraignment. The papists then are to be considered in the same condition as monks, and as *substantia non recipit majus aut minus*, the incapacity to purchase must

must be equal in both: and consequently he can no more take an estate by virtue of a common recovery, by whomsoever suffered, than a monk could have taken it.

I cannot imagine how the danger of perpetuities comes to be laid in the way. No body pretends that a recovery to the use of a protestant is prohibited; and as long as papists are at liberty to suffer them, though with that limitation, they may mortgage, they may sell, or any ways load their estates, and so carry forward the very end and purpose of the statute, which was to remove the land of the nation out of popish hands, by obliging them to sell; nor is this any real damage to the papist himself, since, though he parts with his land, he has an equivalent for it.

It has been said by some of the counsel, that this point was determined in the case of *Thornby* v. *Fleetwood:* but this objection was never made in that case, and indeed it had been very impertinent; for first, one of the recoveries in that case was before this statute; but if both had been since, it could not have made for the plaintiff; because if they had been void, it would have given him no title, for then *Charles* Lord *Gerard* had been seised in tail, and the heir in tail is now living: but the true point in that case is, whether Lord *Gerard* took any estate at all, so as to enable him to suffer a recovery.

Another objection has been made, that to destroy this recovery of Lord *Derwentwater*, would be dangerous to many protestant purchasers, who have come in under such titles. But whatever this might have been formerly, it is now removed by the statute 3 *Geo. cap.* 18. which secures protestant purchasers, 3 G. c. 18.
and looks backward as well as forward, by enacting, "That "no purchases made or hereafter to be made by protestants of "papists shall be impeached, on account of any disability the "papists were laid under, either by 1 *Jac.* or our statute.

Having thus answered the inconveniencies urged on one side, let us now see whether there are no unanswerable ones of the other. And I think there are: for, 1. To establish this recovery, is to give papists a power of cutting off protestant remainder-men, and so far taking away the very landed interest of protestants. 2. They will be able by this means to turn the course of descent, as it shall serve the purpose of removing the estate out of a protestant, into a popish line. 3. They will have a power of making themselves tenants in fee, and upon occasion to distribute freeholds in a county, and influence the state of our legislature by the votes they make at their election. 4. It puts the heir too much in the power of the ancestor, who

who may make ufe of his liberty, with a view to prevent the converfion of his fucceffor.

Upon the whole I am of opinion, this recovery is within the words of the ftatute, both as a purchafe, and as a greater and better eftate which is gained from the remainder-man, and turns to the benefit of a papift. For the danger can never be the lefs, where he gets it for nothing, than where he pays a valuable confideration. If it be within the words, why is it not within the meaning? Is not the meaning to be collected from the words, and the words to be interpreted according to law? It is certainly right, what the Judges faid in *Roper's* cafe, that the words of a ftatute are to be taken in a legal fenfe, unlefs the intent appears to the contrary; and to fay the acts of a ftranger only are reftrained, and not of the papift himfelf, is to fpeak without any warrant from the ftatute, for that makes no fuch difference, but leaves the perfons conveying, all upon the fame foot, with no other regard but *to whom* it is conveyed.

I would now mention fome cafes to juftify and clear my opinion. *Roper's* cafe I apprehend is much ftronger than this, that was a devife of lands to truftees to be fold, and after payment of debts and legacies the furplus was to go to a papift; and it was adjudged in the Houfe of Lords, that this devife of the furplus was void, not upon account of the poffibility that the papift might have the land itfelf; for in fuch cafes, if the Chancellor takes care that the truft be executed, and the land fold, the papift can never have the land, and in fact the land was fold, when that caufe came into the Houfe of Lords; fo that it was really but a pecuniary demand: but becaufe of the connexion with land, and becaufe it might draw that along with it; it was held to be within the ftatute. And in the prefent cafe here is a greater and more valuable intereft in land gained by a papift, which makes it much ftronger.

Another cafe I fhall mention, was *Humphrey's* cafe, which came out of the northern circuit to be argued above. Leffee for ninety-nine years yielding rent furrendered to a papift the reverfioner in fee; and held, nothing paffed, and the furrender void. It was held fo by my Lord Chief Baron *Ward*. Now I would obferve, that in that cafe the reverfioner did not take by purchafe, but the benefit which accrued to him was by a merger of the term; but becaufe it was an enlargement, and a bettering of his eftate, it was held to be within the ftatute. And where is the difference, whether his eftate be enlarged before or behind; by the addition of a particular eftate, preceding, intervening, or coming after his own? The only thing that is material is the increafe, and there is that in our cafe, as well as in the other.

To

To conclude, the words of this ftatute are general, and as large as could be contrived to take in all conveyances, and to obviate such objections as are now fet up. The rule of law in conftruction of thefe ftatutes warrants the taking them in a full latitude, for its being a penal law will intitle it to no favour, where religion and the publick are concerned. And fo it was refolved in *Fofter's* cafe, and *Magdalen College* cafe. The ftatute takes in both confiderations: it is made for the prefervation of church and ftate, and therefore is to be carried to its utmoft extent.

For thefe reafons I am of opinion, that the claim was well difallowed, and confequently the decree of the commiffioners ought to be affirmed.

Mr. Baron *Mountague's* argument. This is a cafe of great importance, as it is on the conftruction of a ftatute, which, though made twenty years ago, has never yet been fully confidered: and it is of difficulty too, becaufe two learned Judges have already differed, and I believe I fhall differ from both in many points.

Mr. Baron *Mountague's* argument.

It appears that at the time of fuffering this recovery there was a marriage fettlement on foot, and it is evident to me, that the recovery was had for that end. Lord *Derwentwater* is tenant in tail of an ancient family eftate with remainders over. When a treaty of marriage was on foot between him and Sir *John Webb's* daughter, in order to make a jointure and provifion for the marriage, he agrées, according to the common method of conveyances, to make a tenant to the *praecipe* in order to fuffer a recovery, and declares the ufes to himfelf for life, then to his wife for life, remainder to the claimant as firft fon in tail. Such recovery was had, and the marriage took effect: he was attainted of high treafon: and the queftion is, whether the eftate is forfeited, fo as to exclude the firft fon of the marriage.

N. B. He miftakes the cafe, for the ufe of the recovery was only to himfelf in fee; and the ufes he mentions were afterwards declared by an original deed of fettlement, and the Baron's whole argument depends upon a miftake of the cafe.

For my own part I think the matter will come to this dilemma, either Lord *Derwentwater* took by virtue of this fettlement, or he did not. If he did take, then it was for life only, and he could forfeit nothing but an eftate for life, and being dead, the claimant's eftate-tail muft take place. If he did not take by virtue of this fettlement, what hindered him? The ftatute, fay they, of 11 & 12 *W.* 3. which makes him incapable of purchafing. And if fo, then nothing was in him to forfeit.

The only way of avoiding this dilemma is, that which brother *Fortefcue* has taken, by faying that not only the ufes to Lord

Lord *Derwentwater* himself are void, but the whole conveyance is void also: *nihil operatur* by all this: here has been a bargain and sale to make a tenant to the *praecipe*, a recovery suffered, uses declared, and all this comes to nothing. This I take it is the foundation of the judgment given by the commissioners. But surely he that considers the words of the statute, which says only, "That all estates and interests for a papist shall be "void," but mentions nothing of the conveyance itself, cannot be of that mind. But it is said it amounts to the same thing in the present case; for if the uses are made void, and he is disabled to take, and so the conveyance carries nothing, it is really making the conveyance itself void: and the case of a monk is put to support this, where a lease to him for life, remainder over, is void as to the whole conveyance on account of his incapacity. I agree it is so where the conveyance is to a person incapable of taking; and so if in our case the conveyance had been to a papist, this might have been true; but here are several persons capable of taking concerned in this conveyance: there are several remainders over that may be good, since they are to persons who do not yet appear to be papists, and the present claimant is young and may become a protestant: there are also trustees to preserve the remainders from the ceasing or forfeiture of the particular estate. So that I cannot see that Lord *Derwentwater*'s incapacity will make the whole conveyance void, when it may, and was intended to subsist for other purposes than that of passing an estate to a papist.

Let us consider this whole conveyance particularly. Here is first a bargain and sale to *Vaux* for a valuable consideration, (*viz.* 5 *s.*) he is a protestant, therefore without doubt every thing is right thus far, to vest the estate in him and make him tenant to the *praecipe*. Supposing now the subsequent recovery entirely void; the estate then remains in him. This appears evidently from *Poulter*'s case, 1 *Co.* that though superstitious uses are void, yet if a penny had been given as a consideration, it would be sufficient to pass the estate absolutely to the feoffees to their own use; otherwise it would revert to the feoffor. In our case the consideration is greater, for 5 *s.* was actually paid. And this shews that the uses to a papist may be null, and yet the conveyance not void.

If then the bargainee is seised of this estate, it must be out of Lord *Derwentwater*; and it cannot be otherwise, unless the *praecipe* be ill brought against *Vaux*.

The next thing is the recovery, and this is gained by one *Ridley* He too is a protestant capable of taking, and consequently the recovery vests the fee-simple in him. Should now the uses of this be void, the consequence would be that

Lord

Lord *Derwentwater* would gain nothing by it, and it would make him incapable of losing any thing also, since all the estate he had is passed away to others already.

Brother *Page* says, that it is the right of tenant in tail to suffer a recovery: I agree it is so, with this limitation, that no act of Parliament declares his suffering it a forfeiture, as in the case of a tenant for life. But how comes it to be his right? It is the right in common justice of all mankind to bring a *praecipe* when they have a better right than the tenant in tail; and when the recovery passes against him, it is because in intendment of law the demandant has the better right. This is the ground of the judgment, and this is the true reason of its being a bar to the remainder-man, as well as to the tail. The demandant recovers a clear fee-simple (on which no remainder can depend) without any regard to, or being at all affected by the particular limitations of the estate of which the tenant was seised. All the dependants on the estate-tail can have nothing to say to him, who comes in under the recovery paramount to the tail.

My brother who argued first, mentioned the case of *Benson* v. *Hodson* in 1 *Mod.* but did not make use of the point resolved by the court, but only the saying of Lord *Hale* in relation to recoveries. I never found my opinion on the *dictums* of reporters, in which they are very apt to mistake the words and sense of the Judges from whom they take them; and so it seems to be in that case. Lord *Hale* is there reported to have said, that the recompense in value is not the reason why common recoveries are bars to the remainder-men, but because these are conveyances excepted out of the statute *de donis*. But it is the text of *Litt.* § 688. that if tenant in tail suffered a feigned recovery, the issue might falsify it in a *formedon*. This shews that at common law such recoveries as we now make use of to bar estates were not known; and therefore it would have been ridiculous in the statute *de donis* to have excepted recoveries, since common recoveries were not used, and recoveries on good title could not be imagined to be included. If issue was taken on the disseisin alleged in the writ of entry, and found for the demandant, and so the recovery on a point tried; this at common law would bar the issue, there lying an attaint against the jury; though where it was by default, it would not. But afterwards another middle way was found out, and favoured by the Judges, to prevent the inconvenience of perpetuities; and that was where the tenant in tail appeared and vouched over, and the vouchee made default, and so there was a judgment for a recompense to one, and for the land demanded, to the other.

 This

This judgment, though by default, and without iffue tried, was held a bar, on account of the recompenfe in value.

My brother *Page*'s notion of Lord *Derwentwater*'s coming in under this recovery by operation of law, as fomething diftinct from either a purchafe or defcent, is very new and uncommon. One of his inftances of an eftate paffing in that manner is the cafe of a tenant by efcheat: but I think my brother *Fortefcue*'s opinion is right as to that, for he certainly comes in by defcent, *in loco haeredis*.

But why is not this taking by the recovery a purchafe? I wonder how that can be made a queftion amongft lawyers: is not this the very point in *Shelley*'s cafe, where old *Edward Shelley* is adjudged to be a purchafer of a new eftate, by fuffering a recovery?

But then the queftion is, whether this be a purchafe within the meaning of the ftatute of King *William*? As to that, I think I need not enter into it, becaufe the cafe turns upon the dilemma I mentioned before.

My opinion is, that the conveyance and recovery are good, and if my Lord *Derwentwater* gained any eftate, it was but for life. If he gained none, he had nothing to forfeit. So that taking it either way (he being now dead) the commiffioners had no right to feize this eftate, and confequently their decree ought to be reverfed.

Mr. J. *Tracy*'s argument.

Mr. Juftice *Tracy*'s argument. I am of the fame opinion with my brother who argued laft, that the decree of the commiffioners ought to be reverfed.

The queftion is, whether the recovery be void, or not; which depends on that part of the ftatute, by which every papift is difabled to purchafe in his own or another's name; and all eftates, terms and interefts had, done and fuffered for his benefit or relief, are made void. I take this to be one entire claufe, and the latter part put in only to explain and enforce the former; and there was great reafon for it. The firft part only difables papifts to purchafe lands, but not interefts or profits out of lands; and therefore the latter was neceffary to difable him to purchafe thofe as well as the lands themfelves. But if the latter part is to be conftrued as a diftinct independent claufe, then the firft part would be rendered wholly infignificant; fince the latter has all that the firft has, and much more. So in 1 *Jac.* 1. *c.* 4. from whence this claufe is taken: Perfons paffing or fent into popifh feminaries beyond fea are made incapable,

capable, as to themfelves only, and not as to their heirs, of inheriting, purchafing or taking any manors, lands, &c. "And all eftates, terms and interefts made, fuffered or done to or fo their benefit and relief fhall be void." Now this muft be taken all together but as one entire claufe, for otherwife the latter part will be a repeal of that part of the foregoing, which makes them incapable only as to themfelves, and not as to their heirs.

But now as to the meaning of the claufe before us. It founds ftrange to me, that the act of the tenant in tail himfelf on his own eftate fhould make him a purchafer of it. A purchafe I take to be *acquifitio rei alterius*, either by free-gift of the former owner, or for a valuable confideration. 1 *Inft*. 18. *b*. But what is a common recovery? It is nothing but a common conveyance, and the only method which the law gives the tenant in tail of enjoying his eftate in its full latitude; and it is as much the proper conveyance of a tenant in tail, as a feoffment is of a tenant in fee-fimple, and therefore very unlikely to be reftrained by the general words of a ftatute. I think it could not be the intent, fince there are no exprefs words to that purpofe; and I am the more inclined to fuch an opinion in this cafe, becaufe it appears to me, that fuch a reftraint, inftead of promoting any end of the ftatute, ferves to defeat its principal defign.

The ftrength of all that has been faid to bring the recovery within the difabling claufe lies in this, that the fee gained is a new and greater eftate than Lord *Derwentwater* had before, and fo makes him a purchafer.

But this is more in appearance, than in the nature of the thing. I think the recovery cannot be faid to give any new eftate, becaufe it operates only by way of bar; and an eftate or intereft barred is extinct and gone, and cannot properly be faid to be transferred. The fuffering a recovery is no more than making ufe of that very power which the law had given him over his own eftate, and when he has by this gained the fee, he has in reality got no greater intereft in it than he had before; the courfe of defcent only is altered, fo that it fhall now go to one fort of heir, whereas during the continuance of the tail it would have gone to another: but as to himfelf, he had the whole eftate abfolutely at his own difpofal before, and he has no more than that now. How then can this be faid to be a purchafe, efpecially in fo penal a law?

But if this is a new eftate, from whom does it come? Not from the remainder-man or reverfioner, for their eftate is gone and extinguifhed. And therefore the cafe of a grant from the

 reverfioner

reverſioner of his reverſion is very different, and ſo of a ſurrender of a tenant for life to the reverſioner; in both which caſes there is an eſtate really taken from another man by his own act and conſent. So in Lord *Lincoln*'s caſe cited by my brother *Forteſcue*: he had deviſed the eſtate, and then made a leaſe and releaſe to the uſe of himſelf and his heirs; and it was held to be a revocation of the will. But this would be the ſame, if a man after making his will makes a feoffment to the uſe of himſelf and his heirs; this is a revocation, becauſe it ſhews an alteration of his mind, but yet in that caſe it is confeſſed he would be in of the ſame eſtate.

The recoveror is merely a nominal perſon, which the law requires, in order to fulfil the ſolemnity of a recovery; but has nothing at all to do with the eſtate; and if the tenant makes no declaration of uſes, the law will do it for him, for the eſtate paſſes only from the tenant in tail, and not at all from the recoveror; and ſo it was held in the caſe of *Abbot* v. *Burton*, *Salk*. 591.

The caſe of a feoffment and refeoffment is very different; becauſe the eſtate in that caſe was once really out of the feoffor, and when it comes back again by the expreſs act of the feoffee, it comes as a perfectly new eſtate: but in our caſe, in conſideration of law the eſtate was never out of the tenant in tail. The bargain and ſale to make a tenant to the *praecipe* are but one conveyance, and to whomſoever the uſe is limited, he takes immediately from the tenant in tail.

I cannot think the lord by eſcheat comes in by deſcent, as has been ſaid; there is no foundation for it in *Co. Litt*. 18. *b*. He only ſays, that ſuch an eſtate differs from one by purchaſe, becauſe he comes in by operation of law, as *he* does that comes in by deſcent. But this does not prove that the lord by eſcheat comes in by deſcent.

But now if the law itſelf, as I have ſaid, would make a declaration of uſes of the recovery to the tenant in tail, in fee, which can be nothing but the old eſtate which he had before this conveyance; it is the ſame thing if there be an expreſs limitation in the ſame manner as the uſes would have reſulted. This was adjudged upon two ejectments in the caſe of *Godbolt* v. *Freeſtone*, 3 *Lev*. 406. A man ſeiſed *ex parte materna* makes a feoffment to the uſe of himſelf for life, remainder to his wife for life, remainder to the iſſue of his body, remainder to his own right heirs. He and his wife died without iſſue, and the queſtion was between the heir of the part of the father, and the heir of the part of the mother; and held that this was the old uſe remaining in him; and there was no difference

 whether

whether the uſe be by expreſs limitation, or implied by the law without limitation, and therefore ſhould go *ex parte materna*.

Some ſtreſs has been laid on the word *ſuffered* in the ſtatute, as particularly adapted to the caſe of a recovery; and I ſhould think this of ſome weight, could that word be applied to no other recovery but this. But there is room enough for the uſe of that word without taking in the preſent caſe: it may be applied to the caſe of a fine; to a recovery of a ſtranger's eſtate by a papiſt, fairly or by colluſion; and in general to all recoveries whereby a papiſt is to gain ſome really new eſtate.

But if this recovery ſhould be ſtrictly within the letter of the ſtatute, yet I do not think it is within the meaning of it. The intent of the ſtatute was to take away the capacity papiſts had of acquiring new eſtates, not the power of diſpoſing of their old ones: and on this ground I conceive there may be ſeveral caſes put, where even new eſtates may be gained, and yet not be within the meaning of the ſtatute. As if a papiſt had before the ſtatute made a ſettlement to himſelf for life, with remainders over, and a power of revocation, and after the ſtatute he had executed that power; he has now now gained a new eſtate, and yet as this is only making uſe of the power he had over his own eſtate, I think it will not be within the ſtatute. Suppoſe a papiſt ſhould in an ejectment recover an eſtate, will any body ſay this is is within the ſtatute? Or ſuppoſe before the ſtatute he had a particular eſtate with a condition of accruer of the fee on performance of a certain act, ſhall he not perform this and gain the fee to himſelf, notwithſtanding the ſtatute? Surely he ſhall, for the ſtatute had no retroſpect to take away any right veſted in a papiſt.

Another reaſon why I think it not within the ſtatute is, becauſe it will not anſwer any end of the ſtatute to conſtrue it ſo. The end of it was to leſſen the papiſts property in land; but how can this be anſwered by forcing them to continue their ancient eſtates? By virtue of the tenancy in tail they have an equal ſhare of power and influence in the country as if they had the fee. They have the ſame power in elections: they may give freeholds, and not only make votes, but even give capacities to ſtand as candicates for an election; for he may make them an eſtate for life, and I am apt to think a tenant in fee would go no farther.

But not barely to ſay this conſtruction will not anſwer the end of the ſtatute, I am bold to ſay this conſtruction will in a great meaſure defeat it, by making the eſtates of papiſts much more ſecure than they were before: by allowing theſe recoveries

veries all papifts in remainder and reverfion are cut off; the eftate becomes affets in the hands of the heir: it is liable to charges in favour of younger children; and all forts of incumbrances, which are excluded by the continuance of the tail, are let in; and it is fubject to more forfeitures, particularly for felony, which the tail is not liable to: and thus by loading the eftate a papift will be at laft obliged to fell, and then the end of the ftatute is anfwered.

No argument can be drawn from the unreafonablenefs of putting the remainder-man and reverfioner into the power of the tenant in tail, for we fee the ftatute of forfeitures has taken no care of them at all: and why we fhould be more folicitous for them than the legiflature was, I can fee no reafon.

The cafe of *Roper* v. *Radcliffe* I think not at all like this, the true reafon of that judgment was, that if he had taken by the devife, it was looked on in nature of a purchafe of the land itfelf. My brother *Fortefcue* fays, the eftate was fold before the hearing in the Houfe of Lords, but I do not know that.

This ftatute is now twenty years old, and many purchafes made under fuch recoveries as thefe, which were never queftioned till now: and though there is a ftatute lately made for the fecurity of fuch purchafers, yet I cannot but pay a very great regard to the opinion of fo many learned men, who have gone on in this method ever fince the ftatute.

As to the point of the reverfion in fee, expectant upon the intermediate remainders, being now let in by this recovery; it was mentioned by the counfel, but I fhall not give my opinion upon it, becaufe I think it not neceffary; and befides it is a very important point, only the cafe of *Symmonds* v. *Cudmore* goes a good way to prove it.

Upon the whole, I think this recovery to the ufe of Lord *Derwentwater* in fee was good, and therefore the decree of the commiffioners ought to be reverfed.

Mr. Juftice *Powys*'s argument.

Mr. Juftice *Powys*'s argument. Before I deliver my opinion, I would juft take notice of what is agreed in this caufe; which is, 1. That a papift may fuffer a recovery, in order to make a title to a proteftant purchafer. And 2. That if the recovery had been declared immediately to the ufe of Lord *Derwentwater* for life, &c. *prout* the fettlement, it would have been well enough, which I take to be a great conceffion.

I am

I am of opinion to allow the claim. There have fome things been mentioned in this cafe, that feem not fo neceffary to be infifted on, becaufe that which I take to be the main point is not affected by them. As whether the eftate is fo fixed in the tenant to the *praecipe*, as to continue in him if the recovery fhould be void: but I take it, the whole conveyance is of a piece, and muft ftand or fall together: And if the recovery is made void, I think the whole conveyance muft be fo too.

Another matter not fo neceffary is, *quid operatur* by all this? Whether under this recovery Lord *Derwentwater* is in of his old, or a new eftate? I fhall take no notice of this, but go directly to that which will determine the whole cafe. And I am clearly of opinion, that the recovery fuffered in this manner is not within the ftatute.

Originally an eftate-tail was fee-fimple conditional; and the tenant had the fame power of aliening it after iffue had, that a tenant in fee-fimple now has. It was this *poteftas alienandi*, that was ftruck at by the ftatute *de donis*, which had no intention to alter the nature of the eftate, but left it to continue as it was before. *Salk.* 619.

But then they began to feel the inconvenience of perpetuities, and upon that they looked out for a method to trip up the ftatute *de donis*, and make thefe intailed lands capable of being purchafed. For this purpofe common recoveries were fet up and allowed, and thefe are faid, *Salk.* 338. to have taken off the protection of the ftatute *de donis*, which is as pretty an expreffion as I have met with. And the ufe of thefe recoveries for that purpofe is grown fo common, that they are now looked upon merely as a method of conveyance, by which the power of alienation that tenants in tail have over their eftates is to be exercifed; and the eftate conveyed is not fuppofed to arife out of the eftate of the recoveror, but of the tenant in tail only. Hence it is, that recoveries have all along been conftrued moft favourably, not under the notion of a judgment in a fuit at law, but as a common affurance, and *C[illegible]*'s cafe directs the Judges not to look into them with eagle's eyes. They have been allowed even of advowfons, though no *praecipe* lies of them. 5 *Co.* 40. *Ray.* 7. The precifenefs of form, which is required in other writs, is not neceffary in them. 2 *Roll. Rep.* 67. Remainders and reverfions expectant on eftates-tail are fo much in the power of the tenant in tail, that they are of little or no confideration in law. 2 Co. 74.

It is ſaid that the recovery enlarges the eſtate; but I deny it, for the eſtate-tail is ſtill a fee-ſimple conditional as before the ſtatute of *Weſtm.* 2. and that in the eye of the law is equal to an abſolute fee-ſimple, and therefore capable of being exchanged for it. It is not an enlargement, but only a removing of an obſtacle.

Suppoſe before the ſtatute *Will.* 3. a papiſt had been in poſſeſſion of an eſtate defeaſible upon tender of a ring, and after the ſtatute that right of tender had been releaſed; will any body ſay this is a purchaſe of a new eſtate, and as ſuch made void by the act? I believe no body would offer to aſſert it.

As the eſtate is not enlarged by the recovery, ſo what is gained under it is ſerved out of the old eſtate. It is not a new eſtate which is gained, but only an excreſcence; as a new ſprout can never be called a new tree. Hence all grants and incumbrances made by tenant in tail are ſtill charged on the eſtate in fee. It takes them as related to the former eſtate; whereas if this was a real recovery of an eſtate paramount to the tail, all thoſe charges would be gone.

I think this right to ſuffer a recovery is ſuch an inſeparable intereſt, as cannot be taken away without expreſs words. 1 *Inſt.* 223. *b.* And I am of opinion with my brother who argued laſt, that to allow of theſe recoveries is a weakening of the popiſh intereſt, for the reaſons which he has given.

There is another thing proper to take notice of, which ariſes out of the ſtatute we ſit upon, which veſts the eſtates-tail of traitors in the crown in fee. This ſhews the ſenſe of the legiſlature as to the tenant in tail's eſtate; that it is in effect the ſame as a fee, and that he is the perfect maſter of the whole fee; otherwiſe they would be guilty of an injuſtice too great to ſuppoſe them capable of, in ſtripping the remainder-man (who has committed no crime) of his eſtate, merely becauſe the intermediate tenant had committed treaſon.

According to the opinion of the four Judges who argued for the claimant, the decree of the commiſſioners was reverſed, and ſuch judgment given as ſhould have been given below, *viz.* that the claim be allowed.

Eaſter

Eafter Term

6 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Juftice.*
Sir Littleton Powys, *Knt.* }
Sir Robert Eyre, *Knt.* } *Juftices.*
Sir John Fortefcue Aland, *Knt.* }
Sir Robert Raymond, *Knt. Attorney General.*
Philip Yorke, *Efq; Solicitor General.*

Nicholfon *verfus* Simpfon.

Intr. Paf. 5 Geo. rot. 220.

DEBT upon a bond; the defendant prays *oyer* of the condition, which recites, that whereas the defendant had been convicted for unlawfully killing one deer on a place called *Whinnyrigg Ground* in the parifh of *Clifton* in the county of *Weftmorland*, and within the chafe of the Earl of *Thanet*, *on or about* the third day of *Auguft* then laft paft, and had brought a *certiorari* to remove fuch conviction into the court of *B. R.* If therefore on affirmance thereof he pays fuch cofts as the ftatute directs, then the bond to be void: *Quibus lectis* he pleads, that the conviction recited in the condition for killing a *red deer* at the time and place mentioned was never affirmed in *B. R.* and prays judgment of the action. Whatever is materially alleged and not traverfed is admitted.

The plaintiff replies, and fets out a conviction of the defendant for killing *a red deer between the laft day of* July *and the* 6*th of* Auguft, in a chafe of the Earl of *Thanet* called *Oglebird* alias

alias *Whinfield* in the parish of *Clifton* in the county of *Westmorland*, which was removed into *B. R.* and affirmed: and then avers, that the defendant never was convicted for killing any other deer in the said chase, or any part thereof: that the deer and the killing mentioned in the conviction, are the same with those in the condition; that the place called *Whinnyrigg Ground*, mentioned in the condition, lies in the chase called *Oglebird* alias *Whinfield* in the condiction mentioned; that the chase in the conviction and condition are the same; and the parties the same both in one and the other.

The defendant in his rejoinder craves *oyer* of the conviction, which is set forth *in haec verba*, and agrees with the recital of it in the replication; and then taking by protestation, that the killing in the condition and the killing in the conviction are not one and the same, for plea he says (as before) that the conviction in the condition mentioned for killing a red deer in *Whinnyrigg Ground* on or about the 3d of *August* was never affirmed in *B. R.* And to this rejoinder the plaintiff demurs.

Filmer pro quer' argued, that the rejoinder was ill; for it appears sufficiently to the court, that the conviction upon account of which this bond was given has been affirmed. The conviction answers the description of the condition in every part, but as to the time and place, which are not material variances, 1 *Saund.* 116. Or if they are, yet it is cured by the averments, which have been always allowed in cases of this nature. 4 *Co.* 71. 8 *Co.* 115. 11 *E.* 4. 2. *Cro. Car.* 501. *Lutw.* 1414, 1419. 3 *Lev.* 179. Nor does any prejudice arise from this to the other side; because, if it be not true, he may traverse the identity: here he had an opportunity so to do; he has not done it, and so has by his silence admitted the fact to be as we have alleged; for whatever is materially alleged on one side, and not traversed by the other, is always taken to be admitted. 2 *Ven.* 170. *Salk.* 91. So that, be this variance material or not material, either way it is against him upon this record.

Agar contra. The averment as to the identity can have no force, because it is contrary to what appears upon the face of the record; the killing in the condition being in a particular part of the chase, and the other laid to be in the chase at large, so the same evidence will not serve both: Besides, here is no averment of the identity of the conviction, but of the crime only, whereas a man may be doubly convicted of the same offence.

But if the averment should be taken to have cured the variance, yet the plaintiff should have gone on and assigned a breach in the replication; for, as it now stands, the bond is not forfeited, unless

unless the plaintiff was put to charges, and those charges unpaid, and nothing of that appears. 1 *Saund.* 102. *Yel.* 78. *Salk.* 138. *Show.* 140.

Per curiam, It is certain that the identity must appear to us, before we can give judgment against the defendant. But though there are variances, yet the averments (which are consistent with the record) have sufficiently solved them. It would have been improper to have averred the identity of the conviction, and so have sent that to a jury, especially when it is consequentially determined by the other averments, as it would have been if the defendant had taken issue upon them. Then as to the objection for want of a breach in the replication; certainly there was no occasion for that, because the defendant has not made his case upon the performance of the condition, but upon a collateral point by way of excuse, which admits a non-performance; and it has been often resolved, that where the defendant pleads matter of excuse, which admits a non-performance; it is enough for the plaintiff in his replication to meet the plea, and falsify the excuse, except in one instance (which stands upon a particular reason) and that is the case of an award, where it has been held indeed that upon *nul agard fait* pleaded, the plaintiff must not only reply and set out an award, but he must go farther and assign a breach, that it may appear to be in a good part of the award; for since it has been held that an award may be good for part and void for the rest, it is necessary to shew a breach of a good part, or otherwise the plaintiff has no cause of action, for the bare finding there is an award will not intitle the plaintiff to recover. Besides this, payment of the costs goes in defeasance of the bond, and should have been shewn by the defendant, being for his benefit. Or if the replication had been ill, yet the plea is so too, for it is not *ad idem*, the condition being for killing a *deer*, and the plea a *red* deer, and then the declaration must stand, and the plaintiff have judgment.

Yel. 78. Salk. 138. Show. 148. 1 Sid. 180, 186, 290. 1 Saund. 102, 317. Hob. 198, 199, 233. 2 Cro. 472.

Where the defendant pleads matter of excuse, the plaintiff need not assign a breach except in the case of an award.

Dominus Rex *versus* Nicholson & al'.

BY a private act of Parliament for enlarging and regulating the port of *Whitehaven* several persons are appointed trustees, and a power is given to them of electing others upon vacancies by death or otherwise. The defendants take upon them to act as trustees without such an election as the statute requires: and upon a motion for an information in nature of a *quo warranto* against them, it was objected by the counsel for the defendants, that the court never grants these informations, but in cases where there is an usurpation upon some franchise of the crown, whereas in this case the King alone could not grant

Informations are granted for usurping a power which was no prior franchise of the crown.

grant fuch powers as are exercifed by the truftees; the c fequence of which is, that this authority was no prior fi chife of the crown.

To this it was anfwered and refolved by the court, that rule was laid down too general, for that informations h been conftantly granted, where any new jurifdiction or a p lick truft is exercifed without authority. That this cafe c even within the defendant's own rule, for all havens bel originally to the crown. The publick trade and revenue much concerned in the regulations of ports; and there beir particular method of election required, we will always k people up to that method; and rather than fuffer them to v from it, we have conftrued corporations to be abfolutely folved. An information was granted.

Between the Parifhes of Albrighton *and* Skipton.

Order.

UPON appeal from an order of removal made by two jufti *(quorum unus)* the feffions, reciting that they had p ufed the charter of *Albrighton*, and it not appearing *thereby* t the two juftices were either of them of the *quorum*, theref they quafhed the order of removal.

Per curiam, The order of feffions muft be quafhed; not want of any power in the feffions to look into the jurifdict of the two juftices, for that they certainly have; but beca that want of jurifdiction is not fufficiently alleged; fince t might have a jurifdiction, though it did not appear upon charter of *Albrighton*. The feffions fhould have faid in gene that it appeared to them, that the two juftices were neither them of the *quorum*, and that would have been good caufe quafh the order of the two juftices.

Davila *verfus* Herring.

Cofts.

UPON trial of the iffue a cafe was made and afterw argued in court, but the fact not being fufficiently f ed, fo as the court could give judgment according to the ftice of the caufe, it was recommended to the parties, accordingly they agreed, to go to a new trial; where the pla tiff was nonfuited. And now the queftion was about the co whether the mafter fhould tax the common cofts of a nonf or take into his confideration all the former proceedings. A upon motion for the court's direction to the mafter it was dered, that he fhould tax the defendant his cofts upon whole, as well with relation to the firft trial as the laft.

Wi

Winter *versus* Lightbound.

THE plaintiff obtained judgment of *Michaelmas* term generally, but was stopped from taking out execution by an injunction out of Chancery; which being afterwards dissolved, he takes out execution *teste* the last day of the subsequent *Michaelmas* term; and whether he could do it in this case without a *scire facias* was the question.

If the plaintiff be hung up a year by injunction, he must have a *scire facias*.

And the whole conrt held the execution irregular, as taken out after the year; for the judgment being general has relation to the first day of the term, and so there is all *Michaelmas* term over and above a year. And they said the statute of *Westm.* 2. which is *infra annum*, must be computed by calendar months, and not by terms; for it was insisted, that taking one term inclusive and the other exclusive, there were but four terms.

How the year is to be computed.

It being thus determined, that the plaintiff was without the year; the next question was, *Quid operatur* by the injunction? Which was compared to a writ of error, and there it has been often resolved, that though the party be hung up never so many years by a writ of error, yet there may be execution sued out immediately upon affirmance without a *scire facias*. But the court said, there was a great difference between the case of a writ of error and an injunction; the former being a judicial proceeding appearing to them upon record, whereas an injunction is not a matter of record so as that the court can take notice of it.

Salk. 322. Show. 402. See 2 Burr. 660.

Anderson *versus* Coxeter.

9 & 10 W. 3. c. 15.

PER *curiam:* The 9th & 10th *W.* 3. *c.* 15. which limits the time of complaining against awards to the last day of next term, extends not to such as are made in pursuance of a rule of *nisi prius*, but only where the submission is by obligation: and nothing is a ground within that statute for us to set aside an award, but manifest corruption in the arbitrators. We will not unravel the matter, and examine into the justice and reasonableness of what is awarded.

What is a good ground to set aside awards, and to what awards the statute extends. See Barnes 41.

Dominus

Dominus Rex *versus* Leonard.

Curia de Banco nostro, when the King speaks, signifies the King's Bench.

TO an indictment for high treason he had pleaded Not guilty; but having afterwards procured the King's pardon, he was brought to the bar, and by consent of Mr. Attorney he waived his former plea, and confessed the indictment: and being then asked, what he had to say against the court's proceeding to sentence, he kneeled and pleaded the King's pardon under the great seal, which was delivered into court, and read, and appeared to be upon condition to transport himself, and to give such security so to do, *qual' curia de Banco nostro dirigeret*. And the doubt was, whether the King's Bench could take the security? and upon consideration it was held, they could; for this description was not confined to *C. B.* as if it had been *curia nostra de Banco*; but here *nostro* coming after *Banco*, it runs in *English* the *court of our Bench*; and this being spoke in the person of the King, it amounts to calling it the King's Bench. And *Eyre* Justice, cited *Articuli super chartas*, *c.* 5. which says, *Les Justices de son Banke*, and my Lord *Coke* in 2 *Inst.* 554. says they mean the King's Bench.

Woodward *versus* Robinson.

If the plea does not cover the whole, and the parties are at issue; yet if it be a record of the same term, the plaintiff may still take judgment.

CASE upon several promisses, and *inter alia* upon a note for 65 *l.* an *indebitatus assumpsit* for 36 *l.* 9 *s.* 5 *d.* and a *quantum meruit* for carpenter's work and materials, wherein he avers he deserved 36 *l.* 9 *s.* 5 *d.* for the work, and the like sum for the materials.

The defendant as to the count upon the note pleads, that he gave a bond in satisfaction of the said 60 *l.* and the plaintiff received it as such. And as to the said several sums of 36 *l.* 9 *s.* 5 *d.* and 36 *l.* 9 *s.* 5 *d.* that he gave a note for so much in satisfaction, and upon issues tendred the defendant demurs.

Upon standing in the paper, no body appeared for the defendant; but it was observed by the court, that there was a discontinuance. And at another day *Strange* for the defendant argued, that there were two discontinuances. 1. As to the note for 65 *l.* where the defendant in his plea has artfully dropped 5 *l.* and pleads only a satisfaction for 60 *l.* And 2. in the plea of a note in satisfaction, which covers no more than two several sums of 36 *l.* 9 *s.* 5 *d.* whereas there are three such sums in the declaration. *Pasch.* 4 *Geo. Nichols* v. *Backhouse*, in

in an *indebitatus assumpsit*, the defendant *quoad* so much parcel of the damages, pleads one plea; *et quoad* so much, *residuum*, pleads another; and on error, when it stood to be affirmed, *Eyre* Justice observed, that between the two pleas the defendant had dropped a penny, and the court held it a discontinuance. So is *Yelv.* 5. *Carter* 51.

To this it was answered, and resolved by the court, that as to the first part of the objection, there was no discontinuance, it being pleaded *quoad* the whole promise; and though it be in law only an answer to part and by that means a naughty plea, yet it will not make a discontinuance; so *vice versa*, if it be pleaded as to part, it will be a discontinuance, though in law it is an answer to the whole. As to the other point, they all held it a discontinuance; but then *Eyre* Justice observed, that it being a record of this term, the plaintiff might yet take judgment by *nihil dicit* for so much as is uncovered by the plea; and cited two instances where it was so done, *Vincent* v. *Preston*, *Mich.* 11 *W.* 3. *rot.* 183. and the case of *Marcas* v. *Johnson*, *Hill.* 3 *Ann.* *Salk.* 180. What manner of pleading makes a discontinuance. Salk. 179. 2 Roll. Abr. 104. N. 1. Lord Raym. 716.

Whereupon the cause was adjourned, to give the plaintiff an opportunity to set it right, which he did. And at another day, *Strange* for the defendant argued, that though the discontinuance was now out of the case, yet the plaintiff ought not to have judgment, because by his replication to the first part of the plea he has offered an immaterial issue: the declaration being upon a note for 65 *l.* the issue offered is, whether any bond was given in satisfaction of a note for 60 *l.* And he cited *Hob.* 113. *Kent* v. *Hall*, where in debt upon a bond for 10 *l.* 10 *s.* the defendant pleads payment of the 10 *l.* *secundum formam conditionis*, upon which they were at issue, and found for the plaintiff: but a repleader awarded, for that the issue was not *ad idem*. And he likened it to the case of *Merril* v. *Jocelyn*, where in debt upon a bond the defendant pleaded payment before the day, and found for the plaintiff; but reversed upon error, because the issue did not leave room enough for the jury to find an absolute breach of the condition. And so it was held in two cases in *C. B.* *Pasch.* 5 *Ann.* *Steele* v. *Manby*, *Idem* v. *Hill*. Immaterial issue.

Per curiam: The replication is certainly naught, but then so is the plea, and the first fault being there, the declaration must stand, and the plaintiff have judgment.

Moody

Moody *versus* Thurston.

Practice.

ACCESS was granted to the books of the commissione for stating and determining the debts of the army, at th prayer of the defendant, being an officer's widow.

Bellamy *versus* Barker.

Words *nient* actionable.

AFTER verdict *pro quer'* for these words, "Your fathe "was a horse-stealing rogue, and you are a great rogue, the judgment was arrested, because not actionable.

Archer *versus* Frowde.

A general admission of *prochein amy* is sufficient.

ERROR of a judgment *in C. B.* in trespass and assault b one infant against another; verdict *pro quer'*: and assigne for error, that whereas the plaintiff had appeared to prosecu this suit by one *Isaac Knight* her next friend, as one specially a signed by the court, yet the said *Isaac Knight* was never so a signed, nor does any such admission appear upon record. *I nullo est erratum* pleaded.

Strange pro quer' in errore argued, that the defendant havin come in *gratis*, and pleaded *in nullo est erratum*, had thereb taken away the necessity of the plaintiff's procuring the retu of a *certiorari* to verify the error, for now the fact is admitte and put in judgment of the court, whether upon that sta of the case there be error in point of law or not.

Though there is a verdict in this case for the plaintiff, y the matter assigned for error is such as at common law wou have vitiated the judgment. In the case of a person of full a want of warrant of attorney was always held to be error, t
32 H. 8. c. 30. the 32 *H.* 8. and then surely the want of an admission of a *pr chein amy* is much more so, because according to 1 *Roll. A*
Cro. Jac. 641. Cro. Car. 61. 287. *A.* 2. and many other books, where it is said, that t reason why an infant cannot authorize an attorney to appe for him is, because he is not supposed to be capable of chusing proper person, and therefore (says the book) he shall have guardian appointed, against whom he may have an easy reme in case of misbehaviour: but before he can sue by *prochein a* there must be the appointment of the court, and that m likewise appear upon record; wherees in this case

is admitted there never was any appointment to prosecute this suit. The statute *Westm.* 2. *c.* 15. which appoints an infant to sue by *prochein amy* runs *in omni casu quo minores infra aetatem implacitare possunt, concessum est quod proquinquiores amici admittantur ad sequendum pro eis*, which in 2 *Inst.* 261. is taken notice of to be thus rendered by *Fleta*, *Sequatur unus de proquinquioribus amicis et admittatur*, and this admission, says *Coke*, must be by order of court.

As this is an error at common law, it lies upon the other side to shew, whether it be within any of the statutes of jeofails. There is no such thing mentioned in any of them, and there was a case, which is a tacit admission, that it is not within them, and that was *Red* v. *Waldron in B. R. Hill.* 6 *W.* 3. *rot.* 249. Trespass by *prochein amy*, Not guilty pleaded, and a verdict for the plaintiff: the same error assigned as here, and upon a *certiorari* returned, that there was no admission, *in nullo est erratum* was pleaded. But after this a *certiorari* was awarded *ad informandum conscientiam curiae* (which need not have been if the verdict had helped it) and then an admission was returned, and the judgment affirmed. Lill. Ent. 238.

But it will be objected, that in this case the very fact of our assignment of errors appears upon view of the whole record to be false; for that *Isaac Knight* is returned at the head of the record to have been admitted to prosecute and defend all suits in *C. B.* on behalf of the infant.

To this I answer; that the admission returned is not such an one as we have assigned the want of for error, which is an admission to prosecute in this particular cause; and I have an affidavit that according to the course of *C. B.* there must be a separate admission in every cause to prosecute or defend *in placito praedicto*, and such an admission it is that is wanting in this case; so that to say here is a general admission, is begging the question, because a general admission is not sufficient.

Indeed in this court it is taken, that an admission of a guardian to appear in one cause will serve for others, but that depends upon the particular practice of this court, that one in custody at the suit of *A.* is bound to answer all other suits against him of the same term, without a distinct process to bring him in. But still in suits *by* an infant (which must be by several processes) there must be separate admissions, for the reason fails which supports the contrary practice in suits *against* an infant. And agreeable to this is the entry *Rast.* 396. *a. Concessum est quod W. B. sequatur pro J. C. qui infra aetatem est versus H. E. de placito terrae*; and the admission returned upon

 the

the ſecond *certiorari* in *Read* v. *Waldron* was particular, to pro-ſecute that ſuit.

At common law, before the ſtatute which enabled men to make attornies, all parties appeared *ſecundum exigentiam brevis* in proper perſon, unleſs where they purchaſed the King's writ of *dedimus*, and that always recited the pendency of ſuch a particular cauſe; and in the caſe of an infant, *Regiſter* 172. *a*. 93. *b*. 27. *b*. there are writs to the Juſtices of *C. B.* ſignifying that ſuch a perſon is deputed to ſue for the infant, and ſo requiring them to admit him; and theſe recite a ſuit depending between *A*. plaintiff and *B*. defendant *de placito tranſgreſſionis*, or as the caſe is.

Wearg contra. *In nullo eſt erratum* confeſſes no errors which are improperly alleged, but as to ſuch it ſerves for a demurrer, and that we ſay is this caſe, for the error aſſigned is contrary to the record, which runs, *et unde eadem Suſanna quae infra aetat' 21 annorum exiſt' per Iſaacum Knight proximum amicum ſuum per curiam domini Regis de Banco nunc hic ſpecialiter admiſſum exiſtentem queritur*, &c. *Cro. Eliz.* 655. Held that you cannot aſſign for error, that there was no ſuch attorney as the defendant has appeared by, becauſe it is contrary to the record, which calls him his attorney.

As to the practice, I am told that when this general admiſſion was entered, it was objected to by my client, and the officer of *C. B.* informed him it muſt be ſo.

18 Eliz. c. 14. But if it ſhould be error at common law, yet it will be cured by 18 *Eliz.* which helps want of warrant of attorney; and this is a caſe within the ſame reaſon.

Strange replied. There are no general words in 18 *Eliz.* and to ſay it ſhall extend to caſes of the like nature will be making that ſtatute entirely uſeleſs, for the 32 *H.* 8. *c.* 30. had before helped want of a warrant of the party againſt whom the iſſue was tried, but went no farther; and then the making the ſubſequent ſtatute to extend to the warrant of the other party, ſhews the judgment of the Legiſlature, that ſimilar caſes were not within the former proviſion; and it is ſtronger too, becauſe in the 32 *Hen.* 8. there are general words.

The recital in the declaration can never be ſet up againſt the admiſſion returned at the head of the record, which is *Conceſſum eſt* that *Knight* be admitted *tam ad proſequendum quam ad defendendum* all ſuits by and againſt the infant. In *Read* v. *Waldron* there was the ſame recital (*prout per* roll, which was brought into court and inſpected.)

Curia.

Curia. The practice of this court warrants a general admission, and there is no inconvenience in it: it amounts to the same thing, whether the admission be general or particular, and no reason can be given why it should not be one way as well as the other. The judgment of *C. B.* was affirmed.

Brocas *versus* the Mayor and Aldermen of the city of London.

THE plaintiff moved that he might have a copy of the poll, and that Sir *John Ward*, who as mayor presided at the election, might produce the original at the trial; and serjeant *Cheshyre pro quer'* cited two cases and produced the rules, where a copy of the poll was ordered to be given, and the original to be produced. 12 *Ann.* Sir *Peter Delme*'s case, and *Trin.* Geo. *Parminter*'s case. The court never orders a poll to be produced without a particular reason.

Strange contra. As to a copy they have had it already: and as to producing the original, we take that to be an extraordinary attempt, because no use can be made of the original which they will not have the same advantage of from a copy. *Mich.* Geo. *Rex.* v. *Smith*, (on consideration) the court declared, that where things are evidence of themselves, as corporation books, &c. they never will make a rule to produce the original, unless it appears to be necessary to be inspected upon account of erasure or a new entry; and so it was held likewise *Mich.* 4 *Geo.* the *company of Gunsmiths* versus *Turville*. In *Smith*'s case indeed there was a rule on a justice of peace to produce an examination, but that was upon account of the necessity of proving the hand of the party, before it could be read against him; and in that case the court was so tender, that they would not oblige the justice himself to attend, but pronounced the rule, not *quod producat*, but *produci faciat*, the examination at the trial. Ante 126.

As to *Delme*'s case, I observe upon the rule, that it was made without any affidavit; from whence we may apprehend, there was somewhat of a consent to it: but as to *Parminter*'s case, I remember there was a juggle about the poll, and some suspicion of alterations, so great, that the mayor attended here a whole year upon an attachment for not producing it; and that was the particular ground upon which that rule was made.

Per Pratt C. J. We never order the original to be produced, where the copy is evidence, without such a particular foundation

as has been mentioned. It was denied in Sir *Gilbert Heathcote*'s case, and I remember there was a consent in the case of *Delme*.

Eyre J. In the case of *Marlborough* the original was ordered to be produced, but then it was upon an affidavit of a rasure. *Et per Fortescue* J. This poll is either a publick thing, like corporation books; or else it is only in the nature of the officer's own private *memorandum*. If the first, then a copy is as much as you can ask, without some particular foundation. If it be only of a private nature, then you cannot have so much as a copy. The plaintiff took nothing by his motion.

Anonymous.

The court will not turn over a prisoner till officer paid for bringing him up.

A Prisoner was brought up from *Oxford* gaol by *habeas corpus*, in order to be turned over to the King's Bench; but the court refused to do it, because the sheriff was not paid the charges of bringing him up, and so he was remanded.

Dominus Rex *versus* Mackintosh.

Person committed for treason done in *Scotland*, not within the *habeas corpus* act.

HE was committed for treason done in *Scotland*, and the first week in this term applied to enter his prayer upon the *habeas corpus* act. *Sed per curiam*, We cannot do it, for that prayer is only in order to be tried, and we cannot try treason committed in *Scotland*. It was then offered by the counsel for the defendant, whether within the equity of the statute (since there could be no application elsewhere) the court would not enter his prayer, and bail him at the end of the term, in case he is not before that time sent to *Scotland*. *Sed non praevaluit*. *Hil. sequente*, there being nothing done, he moved to be bailed, but denied. And *Pas. sequente* the Attorney General consented to his discharge.

Mich. 7 *W.* 3. *B. R. Rex* v. *Leeson & al'*. *Per curiam*, If one applies to us to enter his prayer, we will not bail him at the end of the term, if the treason be in another county than where we sit. But we will send him thither by *habeas corpus*, where he must make a new prayer.

Leighton *versus* Leighton.

Voidable act, evidence.

UPON a trial at bar the defendant made title under an old intail, and amongst other things offered an inquisition *post mortem* in 25 *H.* 8. whereby it was found, that the deceased tenant was seised in fee, and upon traverse of this it went down to be tried, and found to be only a sei

in tail, upon which judgment was given, and an *amoveas manus* issued. This was objected to by the counsel for the plaintiff, because it was taken and tried in *com' Salop*, whereas the lands lay in *Wales*, and this being before the 27 *H.* 8. *c.* 26. which united *Wales* to *England*, was *coram non judice*, and a mis-trial. But the court ordered it to be read, saying it was not void but voidable, and cited *Murrey* and *Wise*, where on a trial at bar depositions irregularly taken were allowed to be read.

The same objection taken on a trial in the Exchequer, and over-ruled.

Dominus Rex *versus* George.

ERROR of an indictment at sessions for a misdemeanor, whereof the defendant was convicted, and it was reversed for three exceptions: 1. Because it was *ideo veniat inde jurata*, when it should have been *praeceptum est vicecomiti*. 1 *Sid.* 364. *Rex* v. *Knott*. 2. It was *venerunt* the jury in the preterperfect, instead of *veniunt* in the present tense. *Trin.* 2 *Geo.* *Rex* v. *Earl.* 3. *Quia tam*, &c. was left out in the award of the *venire*, which is an essential part. *Reg. Jud.* 76. *a.*

Exceptions in error of an indictment.

Trin. 7 *Geo.* *Rex* v. *Pearson* & *al'*. *Jud. revers.* for this fault in indictment for disturbing a congregation.

Withers *versus* Warner.

ERROR *e C. B.* in case upon several promises, demurrer to the declaration, and *judicium pro querente*, and want of an original and warrants of attorney assigned.

The court will take notice that *London* is a city.

Strange pro defendente in errore. As to the warrants of attorney, the plaintiff has not verified that error by the return of a *certiorari*, so we have entered a *non misit breve*, and laid that matter out of the case.

As to the original, I apprehend the plaintiff has not verified his error in the manner he has alleged it, which can only be done by one of these two ways, either by the other party's coming in and confessing it, or by his own procuring the return of a *certiorari*, that there is no original in the cause: here is no confession of the error, and therefore the question will be upon the return of the *certiorari*, whether by that return the plaintiff in error has so far established the truth of his assignment of errors, as to be intitled to have this judgment reversed. And I take it he has not done so in this case, for the action being laid in *London*, therefore the *certiorari* commands the *custos brevium* of *C. B. Quod scrutatis brevibus originalibus de praedicta curia de Banco, de London, de termino Pasch. anno* 5 of the King, he should certify to the court, what he found about it. To this the *custos brevium* returns, *Quod*

ſcrutatis brevibus originalibus ipſius Domini Regis civitatis ſu London, non habetur aliquod breve originale civitatis London a praedicto termino in his cuſtody: all which may be true, an yet there may be an original to warrant the judgment, directe (as all other writs are) *vicecomitibus London* only: and there fore the command being to ſearch for a writ directed *vi London*, and the return being that there is none directed *vi civitatis London*; that amounts to no more than if he ſaid, am it is true ordered to ſearch the files of writs in *Londo* but inſtead of that I have peruſed all the writs of the city o *London*, and find none between theſe parties; or in other words I cannot find an original directed, as never any original in the world was ever made.

As they who procure this return are labouring to reverſe judgment, I apprehend the court will hold a ſtricter han over them, than they would do if it were in order to an af firmance: and the court is always very exact in making th plaintiff in error verify his errors in the manner he has alleg ed them. There was the caſe of Lord *Peterborough* v. *Akin* in the Exchequer Chamber in *Trin.* 5 *Geo.* where we ha aſſigned ſeveral matters of error, and in order to verify the we prayed a *certiorari* to the *cuſtos brevium* of the court of Ex chequer; and it was objected of the other ſide, that this w no prayer of a *certiorari*, there being no ſuch officer in t court of Exchequer; but the writ ought to have been pray to the Barons: I was counſel in that caſe, and I did offer to the court, whether they would not take the words *cuſt brevium* to mean any perſon who had the cuſtody of the wri and not confine it to any particular perſon as an officer call a *cuſtos brevium*; but the court ſaid they would conſtrue n thing in our favour, and ſo the judgment was affirmed.

As to the variance between *London* and *civit. London*, th is *Bro. Repleader* 6. *Dett* againſt *A. B. nuper de Briſtol:* defendant pleads, that the day of the writ purchaſed he v *commorant* at *Dale abſque hoc* that he ever lived *apud praedict villam Briſtol*; and found for the defendant: but a replea awarded, for that the writ was *Briſtol* and not *villa Briſtol*, yet there was the word *praedict.* to tie it up to what w before, which is wanting in our caſe.

And as to what may be ſaid, that every body knows t *London* and *the city of London* are ſynonymous expreſſions denote the ſame place: To this I anſwer, 1. That taking return as a matter of fact, then though *London* and *the cit London* are one and the ſame; yet in point of fact a writ rected *vic. London* is not a writ directed *vic. civit. Lon* 2. In the next place, to take it as a matter of law, it is be conſidered how this *certiorari* and return are poſſi

to be reconciled; and I can see but one way to do it, *viz.* by the court's taking notice judicially, that *London* is a city, which I apprehend they never will do.

It is true, and therefore I must admit, that the court will take notice of counties, for they are to be considered as part of the common law, delivered down to us from time immemorial: but then in relation to cities, the applying the rule, *quod ubi est eadem ratio, ibi idem jus*, is (as I apprehend) begging the question, for I must insist that the same reason does not extend to both cases.

Every city must be so, either by charter or prescription; and therefore to say the court will take notice of cities, is to say the court will take notice of charters and prescriptions, which is a notion I believe was never advanced, otherwise than as now by way of consequence.

If they take notice of charters, there will be the same reason to take notice of the nature of every incorporation; and when that is done, I much question whether the same reason will not introduce all the by-laws and customs of particular places into the judicial knowledge of the court, which would be the absurdest attempt imaginable. In the case of *Argyle* v. *Hunt in B. R. Trin.* 5 *Geo.* after sentence the defendant came for a prohibition, alleging that it appeared upon the face of the libel, that the word *whore* was spoken in *London:* but the custom of *London* did not appear, and they could not go out of the libel after sentence for a ground for a prohibition; and therefore the court did declare, that they could not judicially take notice of it, and that though they had such a private knowledge of it as not to put the party to produce an affidavit in every case; yet they could not proceed in any case without proof of the custom, if the plaintiff below thought fit to insist upon it. And to this I may add the constant form of pleading, which is setting out at first, *quod civitas London est antiqua civitas*, not to mention the innumerable authorities which require all inferior jurisdictions (of which *London* is one) to set out *quo jure* their courts are held, in all cases where the point immediately concerns themselves.

For any thing appearing upon this record *London* may as well be a ville as a city; and though I can cite no cases where the court has said they will not take notice of cities, yet I rely upon this as a strong argument it was never so much as thought they would, till the other side produce authorities to shew they will. In the case of the *King* v. *Clerk*, 5 *Mod.* 162. *Salk.* 349. *Holt* C. J. put the case of a nonconformist living in a borough that sent members to Parliament contrary to 17 *Car.* 2. *c.* 2.

and he was discharged, because not averred in the return, that *London* sent members to Parliament, for the court could not take notice of it.

But further: when this return comes to be narrowly considered, it will appear to be in a manner insensible. The words are, *non habetur aliquid breve originale civitat. London*, which in *English* will run, That there is no original of or *belonging to* the city of *London*; whereas the writ in this cause can belong to nobody but the plaintiff. And how then can it be said to be a verifying the error, when he is commanded to send up the writ which the plaintiff purchased to found the jurisdiction of *C. B.* for him to say he has not the writ which belongs to the city of *London*.

Since therefore the judgment *may not* be erroneous, the court will take it to be right; and we had no occasion to allege diminution, and put ourselves to the charge of fetching up the right original, when there is nothing appearing upon this record to obstruct our having the judgment affirmed.

Wearg contra. This being a matter of form must be governed by the practice, and it is the constant form which the *custos brevium* uses. It is agreed, that the court will take notice of counties; and then *London* being a county, you will take notice of that too. If there had been a county called *London*, and a city called *London*; as *Oxford* and *Gloucester*, and others; there might be some colour of objection upon account of the uncertainty. But in this record it appears, *London* is a city, for the writ of inquiry is executed *apud Guildhall civit. London.* A writ may be said to be of, or belonging to *London*, without a necessary implication that *London* is the owner of it.

C. J. We ought to support this judgment if we can: the error assigned is so much against the honour of the court of *C. B.* by supposing them to usurp a jurisdiction, and proceed without authority, that I must have the clearest proof in the world, before I can declare they have done so: and I will intend, there is an original, till it appears impossible there should be one. To maintain this return and set aside the judgment, we are to be led out of the record, and take notice that *London* is a city: and if the court would not do it in the case in *Bro.* to support a verdict, I am sure there is no reason we should do it, where the consequence is to overthrow the proceedings: Though *London* is a county, yet it may not be a city, as in the case of *Poole*, and *Haverfordwest.*

Eyre J. (*absente Powys*) The case in *Bro.* is not law. 2 *Cro.* 263. *Hob.* 6. I am afraid this form has been too often used, to

be

be now set aside. *Cro. El.* 489. *Norwich* and the county of *Norwich* were taken to be the same. *Ibid.* 866.

Fortescue J. We take notice of publick acts of Parliament, and in many of them *London* is called a city: we take notice what is couched under an, &c. in the award of a *venire*, and when an avowant speaks of the *locus in quo*, &c. we know what he means.

Adjournatur. And this term *Powys* J. being also in court, the Chief Justice and the rest were of opinion, that they must take notice that *London* was a city, it being mentioned to be so in several acts of Parliament; and therefore held the error to be verified, and the judgment of *C. B.* was reversed.

Hacket *versus* Marshal.

ON error from *Ireland*, it was objected, that the defendant was an infant and therefore there ought not to have been a *capiatur*. To which it was answered, and resolved by the court, that there being a verdict in the case, and the statute 16 & 17 *Car.* 2. *c.* 8. here, being enacted in *Ireland* by 17 & 18 *Car.* 2. *c.* 12. the fault was cured; although the adding a *capiatur* where neither that or a *misericordia* lies, is not expresly mentioned, but only the putting one for another, or omitting either of them, it being a matter of like nature not against the right of the matter of the suit, or whereby the issue or trial are altered. And the judgment was affirmed. *Strange pro defendente in errore.*

Adding a *capiatur* where none lies, is aided after a verdict.

Trinity

Trinity Term,

5 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Justice.*

Sir Littleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Justices.*
Sir John Fortescue Aland, *Knt.*

Sir Robert Raymond, *Knt. Attorney General.*

Sir Philip Yorke, *Knt. Solicitor General.*

Dominus Rex *versus* Inhabitantes de Telscombe.

Contributory order must be to raise a certain sum.

PER *curiam*, The order for the contributory parish to make a rate at 6 *d.* in the pound is ill for incertainty: it should have been, to raise such a certain sum. Quashed.

Barber *versus* Boulton.

Where the charter appoints the election of a mayor to be out of the body at large, it may be restrained by a by-law to a select number. 4 Co. 77. b. Salk. 190.

UPON *non fuit electus* returned to a *mandamus* for swearing the plaintiff into the office of mayor of the borough of *Macclesfield*, wherein the jury found a long special verdict, the case was no more than this. By the charter the mayor is to be chosen by the capital burgesses out of the capital burgesses, who are twenty-four. The usage for fifty years has been, that the common burgesses have put five of the capital burgesses in nomination, out of which five the capital burgesses have chosen one to be mayor: and this the jury find was according to a bye-law

not

not now extant in writing, and that there are no footsteps before these fifty years of any election in any other manner.

At the charter day the common burgesses meet and put eight capital burgesses in nomination, whereof the plaintiff was one, and he had the majority of the capital burgesses for electing him to be mayor.

It being agreed that this election was not according to the usage, the counsel for the plaintiff insisted, that it was an unreasonable usage, for here the common burgesses who have no right in the election under the charter, have it in their power to dissolve the corporation by their neglecting to return five; or if it were good, yet it can only have allowance in cases where they do nominate, and if they do not, then the capital burgesses may make the election under the charter out of the whole body.

Per curiam, This is a good usage, being to avoid popular confusion: but here the election pursues neither the charter nor the by-law. It is not under the charter, for that says it must be out of the capital burgesses at large, and here they confined themselves to eight; nor is it according to the usage, because more than five were nominated, which brings in all the confusion that was designed to be avoided by that provision. *Judicium pro defendente.*

Anonymous.

MANDAMUS to the sessions, to proceed on an appeal; they return that the appeal was dismissed for want of six days notice, which by a former order they had appointed to be given of every appeal. Serjeant *Whitaker* said, they should have adjourned it, and not dismissed it. *Sed per curiam*, The return was allowed, for they are the properest judges of a point of practice at the sessions; and all courts must have stated rules to go by.

Sessions may dismiss an appeal for want of such notice as their practice requires.

Dominus Rex *versus* Inhabitantes de Stroud.

AN order for imposing a rate towards the repairs of the highways was quashed for two exceptions: 1. Because it did not appear but that the statute labour was sufficient. And 2. Because only the *occupiers of land* are charged, whereas others are equally liable.

Order for repair of highways must shew the statute labour not sufficient.

Dominus Rex *versus* Baker.

In convictions ill for the witness to swear the defendant is guilty generally. Barnard. K. B. 89.

CONVICTION for taking pilchards, *contra formam statuti*, quashed, because the witness swears generally, that the defendant is guilty of the premisses, and that is taking upon himself to swear the law.

Dominus *versus* Tilly.

Informer no witness, where intitled to part of the penalty.

A Conviction for deer-stealing quashed because the same person is both informer and witness, and is intitled to a part of the penalty.

Ingoldsby *versus* Martin.

Pas. 6 Geo. rot. 104.

Earl a sufficient description, though the Christian name is mistaken.

IN error of a judgment by default, want of an original writ assigned, and a *certiorari* returned, that there was none: upon which the defendant in error comes and alleges diminution, and brings up an original of the term in the *placita*, and then pleads *in nullo est erratum*.

Strange pro querente in errore, excepted to the second *certiorari* and return, that it had not falsified the error assigned, it being an improper return; for that the writ was directed to *Henry* Earl of *Litchfield*, *custos brevium de C. B.* and the return is made by *George Henry* Earl of *Litchfield*, who is a different person: and it will be no answer to say he calls himself the *custos brevium infranominat'*, for that was the general answer offered to the exception taken in * *Nutton* v. *Craw* and several other cases, where the writ was directed to Sir *Thomas Trevor*, Knt. and returned by *Thomas* Lord *Trevor*; and it was again relied upon in the case of the *Archbishop of Dublin* and *the Dean of Dublin*, *Mich.* 5 *Geo.* where the writ was *Whitchett* and the record *Whitched*: and the court held it was not reconciled by the averment of his being Chief Justice.

* Gilb. Cas. 104. 10 Mod. 283. See Gilb. Cas. 91.

Sed per curiam, There can be but one Earl of *Litchfield*, and therefore, according to 1 *Inst.* 3. *a.* a variance of the *Christian* name is not material.

Variance.

Then it was moved to quash the writ of error, which was, *inter Jacobum Martin nuper de Westm' in com' Middlesex gen'*, and the

the record is only *nuper de Westm' gen'*. So the excess lies in the description, and not in the record, which difference has been often taken and allowed, particularly in the case of *Alston* v. *Lucan*, where the writ had the word *junior*, which was not in the record.

Sed per curiam, There is *Middlesex* in the margin, and so it is well enough. Judgment affirmed.

Jernegan *versus* Harrison.

DEBT upon a bond: the defendant prays *oyer* of the condition, which appears to be for the payment of money on the 23d of *March*, and then pleads payment on the 22d of *March* in the condition mentioned. Duplicity.

The plaintiff replies, that he did not pay the money either on the 22d or the 23d, or at any time after making the bond. And the defendant demurs for duplicity.

Strange pro defendente would have argued against the replication. *Sed per curiam*, You need not labour that, for it is certainly ill; but then so is their plea, and the declaration must stand; for if the plaintiff had gone to issue upon the plea, the verdict must have been set aside, as in the case of *Merril* v. *Jocelyn*.

As to this, *Strange* took a difference between this and the common plea of payment before the day: he admitted it ought to have been pleaded by way of accord and satisfaction. 5 *Co.* 117. But as it was, he said the plaintiff might have taken a safe issue by *non solvit modo et forma*; for the payment is pleaded absolutely, and the time introduced under a *scilicet*, and then *modo et forma* would not make it parcel of the issue. But the plaintiff had judgment. *Solvit ante diem*, ill.

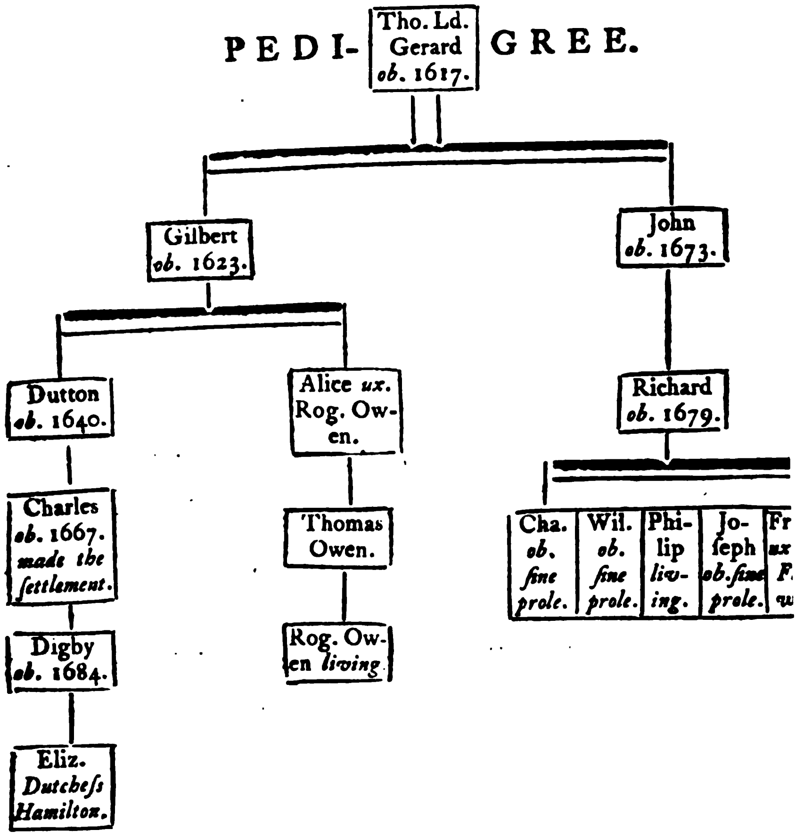
Shadford *versus* Houstoun.

THE court ordered costs for not going on to execute a writ of inquiry, as they used to do for not going on to trial. Costs for not executing inquiry.

Thornby

Thornby *verſus* Fleetwood et al'.

Int. in C. B. de Trin. 9 Annae, rot. 1842.



Of the effect and conſequence of a foreign education in a popiſh ſeminary. Com. Rep. 107. pl. 124. cited in Andrews 104. Lucas 113, 356, 406.

UPON Not guilty in ejectment for lands in the coun[ty of] *Stafford* on the demiſe of the moſt noble *James* Du[ke of] *Hamilton* and *Brandon* and *Elizabeth* his wife, on a trial a[t] in the court of Common Pleas, the jury find this ſpecial verd[ict]

That *Thomas* Lord *Gerard* had two ſons, *Gilbert* and *J[ohn]* and died 1617. That *Gilbert* (the elder) had iſſue *Dutton* [and] *Alice* and died 1623. That *Dutton* had iſſue *Charles*, [who] had iſſue *Digby*, who had iſſue *Elizabeth* now Ducheſs of *Ha[mil]ton*, leſſor of the plaintiff. That *Alice* the daughter of *Gi[lbert]* married *Roger Owen*, Eſquire, and had iſſue *Thomas*, who [had] iſſue *Roger Owen* now living. That *John* the younger [son] of *Thomas* and brother of *Gilbert*, had iſſue *Richard*, who [had] iſſue *Charles*, *William*, *Philip*, *Joſeph*, and *Frances* wife of the

ſen

dant *Fleetwood.* This being the pedigree, they further, find that arles the fon of *Dutton*, being then Baron of *Gerards-Brom-* , and feifed in fee of the premiffes in queftion, by leafe and leafe dated 28 and 29 *November*, 12 *Car.* 2. conveyed the me to truftees to the following ufes. As to part of the lands the ufe of himfelf and the Lady *Jane Digby* his intended wife, r their joint lives and the furvivor of them; remainder to the rft and every other fon and fons of that marriage in tail male, emainder to the heirs male of the body of *Charles*, remainder o the heirs male of the body of *Thomas* firft Lord *Gerard*, great-grandfather of Lord *Charles*; remainder to the right heirs of Lord *Charles.* And as to the refidue of the lands not in jointure, to the ufe of Lord *Charles* for life, remainder to the firft and every other fon and fons of that marriage in tail male, with the like remainders over as before. That the marriage foon after took effect, and Lord *Charles* and Lady *Jane*, by virtue of the faid deed of releafe and the ftatute for transferring ufes into poffeffion, being jointly feifed of part of the premiffes, and Lord *Charles* fole feifed of the refidue for life, had iffue *Digby* their only fon: and afterwards Lord *Charles* died, and Lady *Jane* furvived, and became fole feifed of her part. That *Digby* entered into the refidue of the lands not in jointure, and was thereof feifed *prout lex poftulat*, and alfo of the jointure lands in remainder expectant upon the death of Lady *Jane*; and being fo feifed, died 8 *November* 1684, leaving iffue *Elizabeth*, now Dutchefs of *Hamilton*, his only daughter and heir. That *John* the younger fon of *Thomas*, and *Richard* the fon of *John*, died in the life-time of *Digby*; and *Richard* left iffue *Charles*, *William*, *Philip*, *Jofeph*, and *Frances* wife of the defendant *Fleetwood.* That *Charles* the fon of *Richard*, as Baron of *Gerards-Bromley* and heir male of the body of *Thomas*, entered into the lands whereof *Digby* died feifed, and was thereof feifed *prout lex poftulat*, and alfo of the jointure lands in remainder expectant upon the death of Lady *Jane.* But the jury further find, that *Charles*, *William*, and *Philip*, fons of the faid *Richard*, in the life-time of *Richard* and *Digby*, 1676, (being then infants under the government of their father, and he being then a fubject of King *Charles* the fecond, and under his obedience in the kingdom of *England*) by the faid *Richard* their father were fent, did proceed, go and pafs out of the faid kingdom of *England* into parts beyond the feas, out of the obedience of the faid King, *viz.* to *St. Omers*, and at and in a popifh feminary or college of jefuits, under the obedience of the King of *Spain* then being, there to be educated in the popifh religion and fuperftition ufed in the church of *Rome*; and did there refide for the fpace of five years amongft jefuits and papifts, and during that time were inftructed and educated in, and did profefs that religion. That *Charles* in 1681, and *Philip* in 1693, returned into *England.* That *Charles*, after the death of *Digby*,

22 *May*

22 *May* 1685, granted the lands to *Whitgrave* and their heirs, to make them tenants of the freehold mon recovery was suffered, which was accordingly h fered, *Pasch.* 1 *Jac.* 2. to the use of *Charles* and his then *Charles*, in consideration of 10,000 *l.* portion wi intended wife, grants the same lands to uses which of *Charles* without issue of that marriage are all exti a rent-charge of 1000 *l. per annum* to Lady *Mary*, living. That 27 *October*, 1703, Lady *Jane* died se jointure lands, and *Charles* entered and suffered a co covery, to the use of himself in fee. That *William* sons of *Richard*, died without issue in the life-tim their brother. That *Charles* always from his going to the time of his death was and continued a papist 21 *April* 1707, without issue, nor was his wife the That *Philip*, brother to *Charles*, is living, and heir body of *Thomas*; and always from his going beyo and did continue a papist, and is so now, using and the said popish religion. That *Mary*, widow of *Charles*, is living. That *Roger Owen*, Esquire, g *Alice* the daughter of *Gilbert*, is now living, and th testant of kin to *Philip Gerard.* That immediateh death of the second *Charles* Lord *Gerard*, the defen *wood & al'* entered, and were seised *prout lex post* whose possession the Duke and Duchess of *Hamilto* of the Duchess, did enter and were seised in manne and made the lease to the plaintiff, who entered, an sessed till ejected by the defendants. But whether, whole matter, the re-entry of the defendants be law the jury pray the advice of the court: *Et si pro quer'; et si pro def', pro def'.*

The great question in this case is, whether, upon t the fact, the statute of 1 *Jac.* 1. *c.* 4. will have wrou disability, upon account of the foreign education of *Philip*, as that in judgment of law the remainder t male of the body of *Thomas*, the common ancestor, of *Digby* without issue male having determined all limitations) must be taken to be spent, so as to Duchess, who is the reversioner. If it has, then i plaintiff, otherwise it is with the defendants.

The matter in law upon this special verdict was ai several times at the bar *in C. B. Trin.* 11 *Annae*, b *Hooper* for the plaintiff, and Serjeant *Pengelly pro def'* following by Serjeant *Pratt pro quer'*; and Serjean *def'*; and *Hil. sequen'* by Sir *Thomas Powys pro quer'* jeant *Cheshyre pro def'*. But the same persons having

again in *B. R.* upon the writ of error, where the matter was taken up more at large; I ſhall omit the arguments they made in *C. B.* and take notice only of the reſolution of the court, which was delivered by Lord *Trevor*, C. J. *Paſch.* 12 *Ann.*

Lord *Trevor*, after ſtating the heads of the ſpecial verdict, went on as follows: The plaintiff's title depends upon the conſtruction of the ſeveral acts of Parliament of 1 *Jac.* 1. *c.* 4. 3 *Jac.* 1. *c.* 5. and 3 *Car.* 1. *c.* 2. For the leſſors of the plaintiff muſt intitle themſelves to the lands in queſtion upon ſome diſability wrought by one of thoſe ſtatutes, which diſability muſt enure to make the recovery ſuffered by the ſecond Lord *Charles* to be void, and work a determination of the precedent eſtate-tail, or at leaſt a preſent *ceſſer* of it: and ſince the eſtate-tail is not abſolutely determined; as it is not, becauſe *Philip* who is heir in tail is ſtill living, and may have iſſue who may be inheritable to the eſtate-tail; therefore the leſſors, who claim after that eſtate is determined, cannot intitle themſelves to enter, unleſs ſome or one of thoſe acts of Parliament give a title to them ſo to do; for if thoſe recoveries are good, their remainder is barred; or if they are not good, yet if the eſtate-tail has in judgment of law continuance, they cannot enter by virtue of that remainder.

The only act inſiſted upon by the counſel for the plaintiff is the act of 1 *Jac.* for the other ſubſequent acts cannot intitle them, and the queſtion upon them is only how far they have altered the act of 1 *Jac.* Therefore the counſel did endeavour, with a great deal of art and ingenuity, to ſhew, that the act of 1 *Jac.* had ſo far diſabled Lord *Charles* to take the eſtate-tail by deſcent, that the recovery ſuffered by him was void, and that the ſame diſability being ſtill upon *Philip*, and there being no perſon in being who can take the eſtate-tail, they muſt be intitled, as if it was actually ſpent: then as they inſiſted, that this act wrought ſuch a diſability; ſo they endeavoured to ſhew, that this act is ſtill in force, and not repealed or any wiſe altered by the ſubſequent acts of 3 *Jac.* or 3 *Car.* for I did not obſerve they inſiſted (nor was there any foundation ſo to do) that either of thoſe two later acts could give any title to the plaintiffs, for 3 *Jac.* gives the pernancy of the profits, in caſes of diſabilities under that act, to the next proteſtant of kin; and the act of 3 *Car.* gives the forfeiture to the crown upon conviction.

So that this caſe will depend upon two things to conſider, 1. What is the operation and effect of 1 *Jac.* admitting it ſtill in force, and as if the other acts had never been made.

 2. How

2. How far that act does ſtill continue in force, and whether it be repealed or any wiſe altered by the ſubſequent acts, or either of them.

1. To conſider what conſtruction muſt be put upon the ſtatute of 1 *Jac.* That act ſays, "If any perſon ſhall paſs or go, " or ſhall ſend or cauſe to be ſent any child or other perſon " under their government, into any parts beyond the ſeas out " of the King's obedience, to the intent to enter into or be " reſident in any college, ſeminary or houſe of jeſuits, prieſts, " or any other popiſh order, profeſſion, or calling whatſoever; " every perſon ſo ſending or cauſing to be ſent any child or " other perſon ſhall forfeit 100*l.* *And every ſuch perſon ſo paſſing or " being ſent beyond ſeas to any ſuch intent or purpoſe ſhall, as in " reſpect of him or herſelf only, and not to or in reſpect of any of " his heirs or poſterity, be diſabled and made incapable to inherit, " purchaſe, take, have, or enjoy, any manors, lands, &c.*

Then there is a proviſo, "That if any perſon or child ſo " paſſing, ſent, or then being beyond ſeas as aforeſaid, ſhould " after become conformable and obedient; during ſuch time " as they ſhall continue in ſuch conformity and obedience, " they ſhall be freed and diſcharged of every ſuch diſability and " incapacity."

I would obſerve firſt, as this act is penned, it was very difficult to determine what the effect of this clauſe would be, and what would be the conſequence of that diſability, and who ſhould have the lands during it; for in theſe particulars the act is ſilent, therefore theſe things muſt be left to the conſtruction of law, becauſe there is no expreſs declaration who ſhall have the lands in the mean time.

The counſel for the plaintiff have endeavoured to conſtrue this act in ſuch a manner, as would have a different effect upon lands that were deſcended before the diſability incurred; for they ſeem to admit, that if lands were deſcended to any one that did afterwards incur this diſability, it would diſable him only to receive the profits; but they ſaid, where the diſability is precedent, it ought to be conſtrued ſo as to prevent any deſcent.

Now I would obſerve, that this would be a pretty extraordinary conſtruction, thus to diſtinguiſh between lands coming before the diſability incurred, and all thoſe caſes that may happen upon this act: for though this conſtruction will provide for the caſe before us, yet it renders the act wholly ineffectual as to all other caſes that may be upon it.

Suppoſe

Suppose it had been the case of an estate in fee, that was to descend to a person disabled; according to this construction the estate could never descend upon him; who then shall have it? It cannot be pretended his next heir shall enter in his life-time, for he is not heir to him, he cannot claim the estate till his death: the disability is only personal, and the act says it shall not prejudice the heir, but that after the death of the ancestor he may inherit, but he does not say he shall take in the life of the ancestor. So that if this be the construction, there is no body to take; the consequence of which is, that the disability is of no use, for though the party be disabled, yet if nobody has a right to enter, he may keep it himself, since nobody else can recover it against him.

This would be the case upon this construction, where an estate in fee descended: then put the case of an estate purchased by one disabled: the act disables him from purchasing, but nobody will say but that the estate shall vest in him, so that his heir may claim through him. An heir cannot claim through a purchaser, if the purchase did not vest in him; so that this case too would be unprovided for upon this construction, for the heir cannot take in the life of the ancestor.

This was compared to the case of a monk or a person professed, but they are not alike; for there the disability is grounded upon the maxim in law, that one professed is civilly dead, but it cannot be said that a person disabled by this act is dead in law, for it is not an absolute disability, but only during nonconformity. As to the case of lands descended before the disability incurred, it was admitted, that the estate and interest should continue in him; but that the act is to have this effect, to disable him to take the profits; and if in that case, why not so in the other?

As this is the natural, so it is the legal construction: it is not expressed, who shall have the land; but the act having inflicted this disability for a publick crime against the government, I think the construction of law is, that the land during the disability should go to the crown. Where an act inflicts a pecuniary penalty, or a disability; if the Parliament doth not declare who shall have it, the crown must have it; otherwise the act is wholly ineffectual: and the King being the head of the government, all penalties for publick offenses go to him. Indeed where a particular person has a private injury, the law may give him the penalty by way of recompense; otherwise the crown has the forfeiture; and so it was resolved in the case of *Woodward* v. *Fox*, 2 *Vent.* 269. where an archdeacon sold the office of register, and the question was who

 should

should have the forfeiture? It was adjudged, that the crown should have it. So it is in many other cases, for if you do not give the forfeiture to the crown, you cannot give it to any body else by implication: you cannot give it to one subject more than another.

And as the matter rested on the act of 1 *Jac.* as it was doubtful who should have the benefit of the disability, so it was more doubtful in what manner the crown should have it, whether before conviction or after; by office or inquisition; so that as the forfeiture was uncertain, the method was also uncertain: and these doubts upon the penning of the act did in a manner render it ineffectual.

But however this might stand upon the act of 1 *Jac.* if that was the only act, I think that by the act of 3 *Car.* it is explained and altered, so that since that act it will be much plainer than it was. But before I consider that act, let us see how it stands upon 3 *Jac.*

Now the words of that act are to this purpose, "That if "the children of any subject (not being soldiers, mariners, "merchants, &c.) to prevent their good education in *England*, "shall be sent or go beyond the seas without licence, every "such child or children so sent shall take no benefit by any "gift, conveyance, descent, devise, or otherwise, of or to any "lands, &c. and the next of kin, which shall be no popish re"cusant, shall have and enjoy the said lands, till such time as "the person so sent shall conform; and the person so sending "shall forfeit 100 *l.*"

As to this act, I do not think it has made any alteration of the act of 1 *Jac.* for it seems that this act was made for another purpose, to prevent going beyond sea without licence, and this is a distinct thing from what the former act prohibited; for by this act, if they had a licence, they incurred none of the penalties; but if they went with intent to be popishly educated, they would incur all the penalties of 1 *Jac.* This act never intended to repeal 1 *Jac.* but was made to prevent their going beyond sea upon any pretense whatsoever, without licence; so that it is plain, this has not altered the other: and this seems to be an answer to *Tredway*'s case, *Hob.* 73. for that was founded on 3 *Jac.* and the offense was going without licence, and it doth not appear she went with an intent to be bred up in a popish seminary, though it appears she was afterwards a nun professed. So that case doth not at all influence this.

The next thing to be considered is the act of 3 *Car.* how far that act has either repealed, altered, explained or enlarged the act

act of 1 *Jac.* and in order to form a right judgment of this matter, all the parts of this act are to be confidered, and compared with the provifions in 1 *Jac.*

The title of this act is, "To reftrain the paffing or fending "of any to be popifhly bred beyond the feas;" to lay a further reftraint on that great inconvenience, that was found to grow every day, notwithftanding the act of 1 *Jac.* fo that it feems to be made to prevent thofe inconveniencies, by fome provifions that were not made in the firft act. And it feems that this act was made to the fame intent and purpofe with the firft.

The next is the preamble. "Forafmuch as divers ill affect-"ed perfons to the true religion eftablifhed within this realm "have fent their children into foreign parts, to be bred up in "popery, notwithftanding the reftraint thereof by 1 *Jac.*" Therefore the firft enacting claufe is, that that ftatute fhall be put in due execution: the next enacting claufe extends to all the cafes comprized within the act of 1 *Jac.* and to feveral that are not within that act. For 1. It extends to perfons fent into any *private* popifh family beyond fea, which was not a cafe within 1 *Jac.* that extending only to fome *public* college or feminary. 2. In the next place this act extends to the fending any fum of money for the maintenance and relief of any fuch child, fo fent abroad or under colour of charity. Then it inflicts the fame penalty on the perfon fending and the perfon fent, whereas by 1 *Jac.* the perfon fending forfeits only 100*l.* with this difference between the fender and fent, that the laft is difcharged upon conformity, but there is no provifion for the fender. It is further obfervable that thefe penalties and difabilities are only upon conviction.

Now the penalties here, are all the penalties in 1 *Jac.* and fome more: they are not capable of bringing any action or fuit at law or in equity, nor to be committee of any ward, or capable of any legacy, or to bear any office; none of which were in the act of 1 *Jac.* *And further fhall lofe and forfeit,* (in the fame words as 1 *Jac.*) and mentions who fhall take the advantage. Thofe are the fame penalties, with refpect to the perfon, as are in 1 *Jac.* but it was not faid who fhall take the advantage of them; therefore this act fays he fhall forfeit to the crown upon conviction: fo that this act feems to be made as a further and clearer provifion againft the mifchief, to prevent which 1 *Jac.* was made.

Then there are two provifoes in this act relating to conformity, which differ from that in 1 *Jac.* Firft, That if the perfon fhall conform *within fix months after his return*, he fhall not incur the

the penalties; whereas by 1 *Jac.* he was to be dischar conformity at any time. Then the other proviso is, tl conformity at any time he shall be restored to his land, does not go to the other disabilities: so this act, as it h enforced 1 *Jac.* so it goes further, and has made alte point of conformity.

I would now make some observations, to shew tha of 3 *Car.* (though it is not a repeal of 1 *Jac.*) yet i larged, explained and enforced it, so that now the m the disability to be incurred by 1 *Jac.* is to be governed

It was insisted on by the counsel for the plaintiff act of 3 *Car.* should not be construed to repeal 1 *Jac.* the first clause says, that act shall be put in due ex I do not think it is a repeal, but that clause coming im ly after the preamble, may very naturally be constru put in to shew, that though the act was altered for tl yet as to all cases and offenses that had been committ that act before 3 *Car.* it should remain in force, v fenses could not be punished by 3 *Car.* it having no r

In the next place I would observe, that this act of 3 (from repealing 1 *Jac.* for the provisions made by 3 *Ca* the better execution of 1 *Jac.* therefore it was natura for them, at the time when they were making provisi better execution of that act, to say, it shall still be pu cution; for they were providing for several things ciently provided for before, so that the putting in exec act of 3 *Car.* may properly be said to be putting in the act of 1 *Jac.* for it has strengthened that law, by ing to whom the forfeiture shall go, and in what mann be taken advantage of by the crown, *viz.* upon convic

It must be admitted, that upon 1 *Jac.* either the must be to the crown by implication, and then 3 expresses what was implied before. Or if it should ceive that construction, then it must be agreed, would be defective in most cases that would happen and the person disabled, being in possession, must land, because nobody could make a title against him: most cases; for in the case at bar, the counsel insi the remainder-man might enter, as if the estate-tail w but that will not answer all the other cases that ma this act, for if it were the case of an estate-tail that before the disability, there might be a recovery suffer and the estate might be barred. In case of an inhe

fee defcended, either before or after the difability, or in cafe of lands purchafed, or which fhould come in the nature of a purchafe, there would be no body intitled to the lands in the life-time of the difabled perfon; therefore this act of 3 *Car.* feems to be the rule by which the difability is to be governed, and it fhews what is to be the confequence of that difability, *viz.* a forfeiture to the crown upon conviction.

The counfel for the plaintiff feem to allow, that 3 *Car.* fhould have an effect upon fome lands, and they faid the forfeitures therein mentioned fhould extend to lands that were defcended before the difability, or to lands which were purchafed, and that thefe might be forfeited to the crown; but that it fhould not extend to lands that came after the difability, for that they never vefted in him.

But as to this I would give this anfwer. I think upon the act of 1 *Jac.* the conftruction would have been to give it to the crown in all cafes. If that be fo, it will be a full anfwer, and this act of 3 *Car.* will be only explanatory of what the law was before. But if that were not fo; if it did not go to the crown by 1 *Jac.* but did enure for the benefit of the remainder-man; yet it muft be admitted, that this point was doubtful at that time when 3 *Car.* was made: it was a point that had never been fettled; and if it was doubtful, and 3 *Car.* was made to explain thofe doubts; fhall it be explicatory only of fome things that were doubtful, and not of all that were fo? efpecially when the words are fo general, that they may extend to all cafes. It feems to me, that this act muft extend to all thofe doubts, and to explain the former act fo far, as that all thofe penalties fhould go to the crown upon conviction.

Upon the whole matter: if this cafe depended only on the conftruction of 1 *Jac.* and there had been no other law, though that act had not expreffed that the forfeiture fhould go to the crown, yet I conceive, the difability being inflicted for a publick crime, the forfeiture muft enure to the crown; or if it did not, yet it could not intitle the leffors of the plaintiff to enter, whilft the eftate-tail continues. For though there is a perfonal difability in *Philip*, yet it is but perfonal, and the eftate-tail muft continue for the benefit of the iffue. If he had iffue born, no body could pretend, that the plaintiff could enter; and though he has not, yet he may have iffue.

In the next place the act of 1 *Jac.* being fo doubtful in this point, who fhould have the benefit of this forfeiture, the act of 3 *Car.* being made to enforce that law, does fo far explain it, that this laft act is the meafure by which we are to conftrue this difability.

Accordingly judgment was given for the defendants. And the plaintiff brought a writ of error in *B. R.* and the general errors aſſigned, *Hil.* 1 *Geo. rot.* 564. And *Mich.* 2 *Geo.* it was argued by Mr. *Forteſcue* for the plaintiff, and Serjeant *Pengelly* for the defendant.

Forteſcue. In this caſe I ſhall make three points: 1. Whether the recovery ſuffered by the laſt Lord *Charles* be void, as ſuffered by one who was out of poſſeſſion, and conſequently could not make a good tenant to the *praecipe?* 2. Whether *Philip*'s being alive, who is heir male of the body of *Thomas* firſt lord *Gerard*, be ſuch an impediment, as that the reverſion cannot be executed in the leſſor of the plaintiff as right heir of the firſt Lord *Charles.* 3. Whether the ſtatute of 3 *Jac.* or 3 *Car.* have altered or repealed the act of 1 *Jac. c.* 4.

The firſt point, whether the recovery be good or not, depends ſolely on the words of 1 *Jac.* "That every perſon ſo paſſing, &c. "ſhall in reſpect of him or herſelf only, and not "to or in reſpect of any of his heirs or poſterity, be diſabled "and made incapable to inherit, purchaſe, take, have or en-"joy any, &c." Therefore *Charles*'s being out of the realm, was a diſability in him, ſo as he could not take the eſtate when it ſhould have veſted in him. By this clauſe, omitting the words *(in reſpect of himſelf and not in reſpect of his heir)* the act intended that the offender ſhould take nothing, either for the intereſt of himſelf, or any other; and by a ſubſequent clauſe all eſtates and conveyances made to ſuch perſon or to his uſe are void.

There is a difference between a diſability by act of Parliament, and a diſability at common law; yet conſidering this as a diſability at common law, the law never throws any intereſt upon a perſon diſabled. If an alien purchaſes lands to him and his heirs, albeit he can have no heir; yet he is of capacity to take, but not to hold, for upon office found, the King ſhall have it. If a man be attainted, he is of capacity to purchaſe, but not to hold; for he can only purchaſe for the benefit of the King; he can neither have an heir nor be heir to any man, for by the attainder his blood is corrupted. 1 *Inſt.* 2. *b.* 8. *a.* 1 *Ven.* 417. Now though an alien may take by purchaſe by his own contract that which he cannot retain againſt the King, yet the law will never enable him by act of his own to transfer by hereditary deſcent, or take by act in law, for the law, *quae nihil fruſtra*, will not give an inheritance to one who cannot keep it.

If

If the common law be so, that an estate will not vest in a rson disabled, the case at bar is much stronger, for this incapacity is by act of Parliament. The words are, *shall be disabled and made incapable*, so that he is disabled to take, either for s own or the crown's benefit. The clause as to the heir can e only declaratory and explanative, for words affirmative implying a new law, infer a negative, for the words precedent ere full before, *he shall not take*, that is, he himself in his own erson shall not take, but his heir shall. The reason of inserting the clause therefore was only to satisfy the scruples of the gnorant as to the difference between a temporary and a total disbility, as in the case of attainder, though the difference may be well known amongst lawyers. Where one is attainted of treaon or felony, that is an absolute and perpetual disability by corruption of blood, for any of his posterity to claim as heir to him, or any ancestor paramount; but when one is disabled by act of Parliament, to claim any estate for life, that is a personal disability for his life only, and his heir after his death may claim as heir to him or any ancestor paramount. 11 *Co.* Lord *Delaware*'s case. Where *Thomas Delaware* petitioned the Queen for his place in the House of Lords, which his great grandfather had, though *William* his father was disabled by Parliament, 3 *E.* 6. during his life, to claim any dignity, and it was objected, that his father being disabled by act of Parliament, the petitioner could not convey the descent to himself through the disabled person; but the Judges and House of Lords were of opinion, that he might claim by him, this being only a personal temporary disability, which differs from an attainder.

Though nothing vested in the ancestor, yet the heir may take. The clause *not in respect of his heirs* can signify nothing, the disability extending only to the recusant himself: it is not during life, but only till conformity. This case being a limitation in tail, will be different from what it would be if a fee was limited, for the estate-tail is by the statute *de donis*, and the issue in tail cannot be disabled, but must take by the statute. Therefore if tenant in tail is attainted of felony, and has issue and dies, although by the attainder the blood is corrupted, so that nothing can descend to his heir; yet the issue in tail, as to those lands, is not barred, because he is inheritable by force of the statute *de donis*, but the wife of tenant in tail shall lose her dower, because she claims by the common law. *Lit.* § 746, 747. In his case tenant in tail himself may have a right to take, that so t may descend, to enable the issue in tail to inherit, but he does not take such an estate as that he shall have power to alien. A feoffment by tenant in tail gives away all the estate tenant in tail had, as concerning himself, or any benefit that

he

he may receive; but for the fake of his iffue, and him in rev fion, there ftill remains *in him* a right of that intail by force the ftatute. And by that right the tail may be recovered aga as by the root which is ftill alive, and the heir fhall bring *formedon in defcender*, and lay in his count, *defcendit jus* from the anceftor to him as heir *per formam doni*. *Hob.* 335, 337. *Ray.* 354. 2 *Roll. Rep.* 418. For the ftatute *de donis* fays, that no withftanding an alienation by tenant in tail, the land fhall r main to his iffue, and fo fays our ftatute.

It may be objected that it is impoffible for the heir to tal unlefs the anceftor was feifed, and therefore the eftate muft ve in the recufant. To this I anfwer, That at common law it not neceffary, that the anceftor be feifed, to enable the heir t claim by defcent; for the rule of law is, that where the ancefto *might* have taken the eftate and been feifed, there the heir fha inherit. 1 *Co. Shelly*'s cafe. Nay in fome cafes the heir fha take by defcent, although the anceftor never was or could b feifed of that eftate; as if lands be given to *A.* and *B.* for thei joint lives, remainder to the right heirs of him that dies firft *A.* dies; his heir fhall take by defcent, and yet the remainde never vefted during the life of *A.* *Co. Litt.* 378. *b.*

But even admitting that this act of Parliament cannot hav this conftruction, and at the fame time agree with all the ftric rules of the common law; yet when by an act of Parliamen eftates are limited for particular purpofes, the validity of thof limitations muft not be meafured by thofe ftrict rules, for it i fuppofed the act was made purely for a repeal of thofe rules o maxims, and the mechanick rules of reafon fhall not obftruc the intent of the act, for the ftatute over-rules all private rule of law. 3 *Co.* 64. *b.* 6 *Co.* 40. *b.* 8 *Co. Prince*'s cafe. An eftate-tail may be barred and ceafe for a time, and afterward revive again: it may ceafe as to one perfon, and be in force a to another. 9 *Co. Beaumont*'s cafe. *J. B.* and his wife wer tenants in fpecial tail, he alone levied a fine, and died leaving iffue; during the life of *J. B.* the intail was barred, and nothing was left but a poffibility to the *feme*; for if fhe furvives, fh fhall be tenant in tail as before, for the whole tail revives an is reftored to her.

An eftate-tail may in its felf be perfect and alienable, and y may not defcend, though there be iffue in tail. *Archer*'s cafe and *Hob.* 258. An eftate-tail may defcend, and yet it cannot b aliened. 3 *Co.* 50. It may be full, and yet cannot be aliened o defcend, as in *Beaumont*'s cafe, it could not defcend to th iffue from the mother though fhe had the whole eftate-tail

he

her, becaufe the iffue was barred before by the fine levied by the father; and it could not be aliened by the wife, becaufe it was aliened before by the hufband. *Hob.* 257. Though thofe points are fingularities, and contrary to the known rules of law, yet they being introduced by ftatute, muft not be carried to the rules of law as to their ftandard. The rules of law as to inheritances are arbitrary, and do not depend on the rules of reafon; and that is the reafon why the rules of law vary in different countries.

Objection. That the eftate muft veft in the offender, becaufe the provifo fays, that the offender conforming fhall be freed and difcharged of all and every fuch difability and incapacity; and there being no claufe of reftitution, the party conforming would have no benefit of his conformity, unlefs the eftate always remained in him.

Anfwer. This objection is capable of the former anfwer; that an act of Parliament enacting fuch things, they ought not to be impugned, becaufe they are inconfiftent with the rules of law. But this admits of another anfwer, that it was not the meaning of the act, that the party conforming fhould be reftored to that eftate which was once vefted in the next proteftant; but the meaning of it was, that he fhould from thenceforwards be able to take any other eftate, not to have that eftate which was once forfeited, for he could not take it again by purchafe or defcent. Such a conftruction as is contended for on the other fide, inftead of weakening, would very much encourage popery, and give recufants an opportunity to play the hypocrite; for if by his conformity the eftate fhould be revefted in him, he would conform outwardly, go to church, receive the facrament, and be obedient to the laws for a while, and then get a difpenfation and re-enter, and fo *toties quoties*, which would be to evade the act.

The preventing our youth from being fent into popifh feminaries, to fuck the poifon of their pernicious principles, and ftir up the fubjects to rebellions and tumults, is the greateft bulwark to the proteftant religion. The taking the eftate by the anceftor for the benefit of the heir, as is contended for, is in fhort giving the recufant a power by a recovery to bar his heir, and difpofe of it as he pleafes, which overthrows that claufe, the intention of which was to preferve the eftate for the heir.

2. The life of *Philip* is objected to be an impediment, that prevents the execution of the reverfion, for whilft he lives, fay they, the eftate-tail continues. But I give the objection this anfwer. That *Philip* can take nothing, no more than *Charles* did: the rule of law is, that where any limitation is to a perfon not

not *in esse* at the time the estate ought to vest, the estate must go over to the next in remainder. Here the limitation is to *Philip* and the heirs male of his body, but when that limitation ought to take effect, he is incapacitated to take, and then the limitation over to the lessors must take effect immediately. *Cro. El.* 422. Devise to *R.* in tail, and after his decease without issue to *Edward* his son in tail: *R.* dies leaving issue, living the testator, and there it was held, that *Edward* should have the estate presently, and not wait till the death of *R.*'s issue. 2 *Roll. Abr.* 415. *C.* 6. Devise to one for life who is a monk, remainder over is good. If a man dies seised leaving issue only an alien, the land shall escheat immediately, and not come to the crown. If a man has issue two sons, and the eldest be an alien, the law takes no notice of him, and therefore as he shall not take by descent himself, so he shall not impede the descent to his younger brother, on supposition that he may have issue a natural born subject.

In respect to the incapacity, an alien resembles a person attainted, with this difference, that a person attainted is one that the law takes notice of, and therefore if he be an eldest son and survives his father, he shall hinder the descent to the younger son, though he cannot take himself. 2 *Ven. Collingwood* v. *Pace.* An alien, or person attaint, may purchase; because it is their own act, which the law cannot hinder; but it disables them from taking by descent, and impedes the descent from them, because they must there come in by act of law, and the law will not trust them with an estate.

If it be contended that during the life of the offender the estate shall be in abeyance: I answer, There is no cause to frame abeyances needlessly, which the law loves not, nor admits, but in case of necessity. If in this case the land should be construed to be in abeyance, then it must be framed against the benefit of the church, whereas it ought to be only for its benefit. *Hob.* 338.

3. Whether the statute of 1 *Jac.* be still in force. And 1. To consider it with respect to 3 *Jac.* this last relates to a quite different matter, for though both are levelled at popery, yet the offenses are distinct. In 1 *Jac.* the intention of a foreign education is the offense, so that a man may offend against that statute, and be innocent as to 3 *Jac.* Again; a protestant may offend against 3 *Jac.* papists only against 1 *Jac.* By 3 *Jac.* the offender is capable of taking the legal estate, and loses only the profits till conformity, whereas the offender against 1 *Jac.* takes neither the estate nor the profits. The words of 3 *Jac.* are, *that he shall take no benefit by descent*, not that he should

ıld not take by defcent; and then the ftatute fhews the ning, by giving the profits during his nonconformity to the t proteftant of kin. *Hob.* 73.

. And as 1 *Jac.* ftands unimpeached by 3 *Jac.* fo does it wife by 3 *Car.* The firft bufinefs of this latter ftatute is, :nact 1 *Jac.* to be put in due execution, which could not be, if lawmakers had intended it for a repeal. Befides the effects hefe ftatutes are different, for by 1 *Jac.* the recufant is dif- :d to take the lands which were not vefted, but by 3 *Car.* only forfeits what *is* vefted; for the words are *fhall forfeit all lands*: fo that thefe two ftatutes are very confiftent, for *Car.* was made as a farther provifion to 1 *Jac.* for that only vented the vefting the lands *after* his recufancy, fo that a fon in poffeffion before his offenfe could feel no effect of *Jac.* and therefore to adapt the punifhment to both cafes the :ute of 3 *Car.* came and took away the eftate vefted. But in the cafe at bar the difability was attached in *Charles* and *ilip* before the defcent of the eftate on either of them, there- : the ftatute of 1 *Jac.* muft be the meafure by which this : muft be ruled; and then it follows, that no eftate ever ted in *Charles*, and he having no poffeffion the recoveries are d, and *Philip* being difabled, the land muft go over to the or of the plaintiff as right heir of the firft Lord *Charles*; the fequence of which is, that fhe had a good title to make leafe, and therefore the judgment muft be reverfed, and gment given in this court for the plaintiff.

Pengelly Serjeant *contra*, argued, That under 1 *Jac.* the eftate- l vefted in *Charles*, and would have defcended to his iffue, if had had any. That the fubfequent ftatutes have altered that nalty, and given the forfeiture to the crown upon conviction. hat in this cafe there was no conviction. The confequence which is, that the eftate continued in him all his life, and e recoveries were well fuffered by him.

But if thefe points fhould not be with me, yet under the firft tlement there is an eftate-tail fubfifting for *Philip* and his ue, and therefore the reverfioner cannot enter till the whole tate-tail is fpent.

1. Then, the legal eftate vefted in the recufant, for the onftruction of the ftatute ought to be, that only the percep- ion of the profits of the eftate of the recufant, or at moft fome uncertain intereft determinable on his conformity, ought to reft in the crown; fo that the eftate-tail vefted in *Charles*, and would have defcended to his iffue male if he had left any, and had not barred them by the recovery. The words in 1 *Jac.* that *he fhall be difabled to take in refpect of himfelf, and not in refpect* of

of his heir, were not inserted in the ſtatute by way of proviſo, but are incorporated into the body of the act, to preſerve the eſtate to the heir; leſt the heir, who is innocent of the crime, ſhould be involved in the puniſhment deſigned only for the offender. The act did not intend to prevent the inheritance from veſting in the recuſant, and conſequently prevent the deſcent to the iſſue *per formam doni*, for there is no clauſe to carry the eſtate to any other perſon, which proviſion is in all other ſtatutes: as 6 *R*. 2. *c*. 6. which diſables raviſhers and women raviſhed conſenting after the rape, to have any inheritance or dower, appoints the next of blood to whom the inheritance ought to deſcend, revert, or remain, to enter incontinently. So the 11 *H*. 7. *c*. 20. appoints him in remainder or reverſion (as the caſe is) to enter on diſcontinuances by women. But this act had no view or deſign to abridge the eſtate given by the donor, or to haſten the intereſt of the reverſioner; for the penalty was inflicted, not to affect the eſtate or inheritance of the recuſant, but his perſon only; the heir was not intended to ſuffer any puniſhment, but on the contrary the act deſigned to preſerve the right and eſtate of the heit. The clauſe, *that all conveyances ſhall be void*, can extend only to conveyances made to the recuſant himſelf, or to his uſe, and not to conveyances made forty years before (that is to ſay) it can never affect the ſettlement of the firſt Lord *Charles*, anceſtor to this *Charles*, for *Charles* and *Philip* were not ſuch perſons againſt whom the ſtatute ordained this puniſhment, when this conveyance was made.

This act of 1 *Jac*. having then only diſabled the recuſant as to a ſmall intereſt in the land; it follows, that the reſidue of the eſtate muſt remain in him. If the heir is to take any thing by this act, the eſtate muſt veſt and continue in the anceſtor during life; for the heir, whether he be a general or ſpecial heir, muſt derive his title by the rules of law under the ſettlement of the firſt *Charles*.

There is no difference, when the eſtate is veſted, and when it is to veſt; for it will be agreed, that by this ſtatute lands veſted are not to be deveſted from the recuſant. Our objection is, that if there is a total diſability in the anceſtor himſelf, none can claim as heir to him, and that is proved by the caſe of *Collingwood* v. *Pace*, cited by the other ſide, and then this diſability muſt deſtroy the ſettlement, and ſtop the blood; for if there be grandfather, father, and ſon, and the father is attainted, though neither the blood of the grandfather or ſon be corrupted between them, yet the corruption of the father's blood draws a conſequential impediment upon the ſon to inherit to the grandfather, becauſe the father's corruption of blood obſtructs the tranſmiſſion of the hereditary deſcent between the grandfather and the ſon. If tenant in tail is attainted of treaſon or felony,

lony, and at the time of his attainder had no iſſue, and after e obtaining his pardon has iſſue, ſuch iſſue is inheritable to m; but if he had iſſue before the pardon, the deſcent to ch ſon is hindered, for the blood between him and his fa-er is corrupted, which caſe contradicts *Litt.* § 76, 77. for ough the eldeſt ſon born before the pardon cannot take, nor e youngeſt ſon living the eldeſt, yet there is no *ceſſer* of the ate-tail upon ſuppoſition that the eldeſt will die without ue, and then the youngeſt ſon will inherit. In our caſe, if ere is any right of the eſtate-tail remaining in the recuſant, e reverſion ſhall not be executed. In the caſe of Lord *De-ware* the diſability was impoſed for life, and the court held at one might claim as heir from a perſon diſabled only by act Parliament.

This conſtruction which I am contending for of the intent the clauſe in impoſing only the forfeiture of ſome uncertain tereſt till conformity, will be ſupported by the proviſo for nformity. By that clauſe the party conforming "ſhall, for and during ſuch time as he ſhall continue in ſuch confor-mity, be freed and diſcharged of all and every ſuch diſability and incapacity." Now it would be ſtrange, that the party omplying with the act in conforming to theſe laws ſhould not ave the benefit of ſuch conformity, that is, have the eſtate gain; which he could not, if the eſtate was once veſted in nother, there being no clauſe of reſtitution. The intent herefore of the act was, that the party conforming ſhould be n the ſame condition as before his offenſe, that is, receive he profits of his eſtate to his own uſe. An act of Parliament may indeed make an eſtate ceaſe and riſe again, as in *The Prince's* caſe, but then the words of that act muſt be expreſs.

It may be demanded, to whom did the ſtatute intend to give he profits of the eſtate? I anſwer, that forfeitures given by tatute, either for nonfeaſances or misfeaſances, for publick ffenſes, fines and penalties for offenſes at common law againſt e publick good (no perſon being appointed to take the bene-t of them) ſhall go to the King, as *pater patriae*, the head of e government and fountain of juſtice, who is concerned to e the laws executed. But when the offenſe is private, and fects only particular perſons; there it is but juſt and reaſon-ble, the ſufferer ſhould have the forfeiture or fine for a com-enſation. In the caſe at bar the offenſe is of a publick na-ure, againſt the common good of the kingdom, and conſe-quently the forfeiture accrues to the crown, according to the caſe of *Woodward* v. *Fox*, 2 *Vent.* 267. 3 *Lev.* 289. In 2 *Inſt.* 650, on 2 *Ed.* 6. *c.* 13. the forfeiture of the treble value for not ſetting forth tithes was therefore by expreſs words given to the owner of the tithes, and ſo is *Moor* 238. 1 *Rolk. Rep.* 90.

11 *Co.*

11 *Co.* 60. 2 *And.* 127. As to *Beaumont*'s cafe, the fine by the *baron*, of the lands whereof the *baron* and *feme* were feifed of a fpecial tail, was no *cesser* of the eftate-tail of the *feme*, and in that cafe it is not pretended that the eftate-tail fhall go over to the reverfioner, whilft there remained iffue of tenant in tail fo levying the fine.

This conftruction, that the forfeiture fhall go to the crown, prevents all exceptions; but the other conftruction, that no eftate vefts, prevents the penalty defigned by the ftatute; for if no eftate vefts, the crown cannot have the profits. The act intended no difference, whether the recufant had the eftate before or after the offenfe, nor of the quality of the eftate, whether it was fee or tail; but in reafon, of the two the eftate-tail ought to be more favourably conftrued to be preferved, the ftatute *de donis* taking fo much care to preferve the eftate for the iffue againft the alienation of the tenant in tail; and therefore by that ftatute the iffue was not barred, though the father was attainted of treafon, though it is fince altered by the 26 *H.* 8. *c.* 13.

Befides, in this ftatute there are exprefs words preferving the eftate to the heir. It is more beneficial to the fubject, that the crown fhould have the profits, than the next of kin, who may perhaps employ them under hand to the ufe of the recufant in all or in part: which bargain may be eafily made, confidering that he is but tenant at will to the offender, who whenever he pleafes may conform, and take the land, and recover the mefne profits.

But admitting that no eftate vefts by 1 *Jac.* yet the recovery is good; for the right of the entail continued in *Charles*. 3 *Co.* 6. *Baron* and *feme* feifed to them and the heirs male of the body of the hufband, remainder to *B.* in tail: the *baron* alone levied a fine and fuffered a recovery, in which he only was vouched, and not the wife who had a joint eftate for life with him; yet it was adjudged, that the baron coming in as vouchee, came in in privity of the eftate-tail, and not of any other eftate, and fo the recovery is good.

If the eftate did not veft in *Charles*, then he is a diffeifor, and that way the recovery is good. 3 *Co.* 59. *Lincoln Coll.* cafe. If there be tenant for life, remainder in tail, and he in remainder enters upon the leffee, and diffeifes him, and after fuffers a common recovery; that fhall bind the tail, for the diffeifin does not deveft the tail, but he is a diffeifor of the eftate for life only, and as to himfelf he is feifed by force of the tail. 2 *Roll. Abr.* 395. *C.* 3. 6 *Co.* 32. And fo he concluded this point, that the eftate vefts in the recufant, and only a perception of the profits is forfeited to the King:

or if no estate vested, yet the recovery is good, as suffered by a disseisor, and consequently *quacunque via data* the lessor of the plaintiff can have no title.

2. But admitting that no estate vests in the offender, and that the recoveries are void, yet the plaintiff cannot recover: for if *Philip* cannot take himself, yet there is no *cesser* of the estate-tail, whereby the reversion can be executed in the plaintiff, till the death of *Philip* without issue, 1 *Inst.* 28. as long as any right of the estate-tail remains, the law looks for issue; and though the tenant in tail be 100 years old, yet the law sees no impossibility of his having issue; and *Litt.* § 34. is, that none can be tenant in tail *apres*, &c. but one of the donees in special tail, for a donee in tail general cannot be said to be tenant in tail after possibility, because always during his life there is a possibility that he may have issue inheritable to the same intail.

It is admitted, that if *Philip* has issue at any time, the issue may inherit; and then the estate must continue in *Philip*, because the law expects his having issue. Tenant in tail may suffer a recovery and bar his issue, because he has the whole inheritance in him. As to 2 *Roll. Abr.* 415. where a devise to a monk is held void, and the remainder good: in the same book, *pl.* 4. it is said, that if a lease be made to a man who is not capable (as a monk) for life, the remainder over is not good: so that in a devise, because the intent of the devisor is regarded, it is good; but not in a conveyance at common law. As to the case, *Cro. El.* 422. there the only question was, whether if the devisee in tail die in the life of the devisor, his heir in tail could inherit, and it was held that a subsequent limitation to take effect on the death of such a person without issue should take effect immediately, because there was no possibility for the issue to inherit. *Plow.* 557. *b.* 29 *Ass.* 61. Tenant in tail was bound in a statute merchant, and had issue; the issue was outlawed of felony, but pardoned in the life of the father; the father died, the issue entered, the conusee sued execution of the land, and the heir brought an assise; and it was held that the outlawry for felony so disabled him in his blood, that he could not take by descent the lands in tail, any more than lands in fee, notwithstanding the charter of pardon, which could not restore his blood to its former purity; and when the father died the land could not revert to the donor, because the donee had issue, though that issue was disabled, and upon the father's death the freehold was in no person, but *in nubibus*, and because every man in the world had an equal title, the land *ceditur occupanti*. *Bro. Descent*, *pl.* 23. As to 9 *Co.* 140. *a.* that there may be an estate-tail which may not descend to the issue; the reason is, because there is a total disability by the

 fine

fine of the baron, whereas the disability in the case at bar is only temporary, and is removed upon conformity. 4 *Leon.* 84. *Gouldsf.* 102. An alien born purchased lands in tail, remainder to a stranger in fee, and suffered a recovery; and it was held, that the remainder was barred, for before office found he was a good tenant to the *praecipe*, and that the alien had a good fee-simple; and though in this case it was impossible for him to have issue inheritable to the intail, yet the recovery barred the remainder. If there is in the eye of the law any person that by possibility may be inheritable to the tail, the reversioner shall never enter, till the first limitation is fully at end. Till 1705, *Joseph* the younger brother of *Charles* and *Philip* was alive, and a protestant; and it is not pretended that he could enter, though he was issue in tail; and then if the life of *Philip* prevented his entry, consequently it must prevent the entry of the reversioner. Though *Philip* was a recusant, yet no claim ever came to him, therefore no disability could come to him in respect of the lands, but only in respect of his person: if the reversioner should enter, there would be no remedy for the issue born after.

The disabilities are pardoned by 2 *W.* & *M.* *c.* 10. which is a general law, and therefore to be taken notice of by the court, though not found.

3. This act of 1 *Jac.* is altered by 3 *Jac.* which extends to all the offenses in 1 *Jac.* *Hob.* 73. seems to admit, that the punishment ought to be according to 3 *Jac.* for that he that enters on the land of the recusant is only tenant at will. 1 *Keb.* 263. The court was of opinion, that 3 *Jac.* meant no other cause but what 1 *Jac.* intended, to prevent the education, and that the King hath not an interest in the land of a recusant, as by 3 *Eliz.* *c.* 3. of fugitives, only a right to a perception of the profits, which by the return and conformity of the offender immediately vanishes.

4. The statute of 3 *Car.* has also made several alterations in 1 *Jac.* for it alters not only the disposition of the estate, but the forfeiture; for by this statute there must be a conviction, and then *Charles* not being convicted can forfeit nothing; and the opinion of *C. B.* was that this statute must be the rule. By this the King is to have the land, and by 3 *Jac.* the next of kin, which is inconsistent. It is not necessary to cite all the cases where it has been held, that a subsequent statute being contrary to, or inconsistent with, a former, is an implicit repeal of that former law. 11 *Co.* 61. 1 *Jones* 22. It is agreed, that 3 *Car.* extends to more offenses than 1 or 3 *Jac.* If it had extended to fewer, there might be some colour to say, that the other statutes

tutes are neceffary; but if both 3 *Car.* and 1 *Jac.* inflicting ferent punifhments for the fame offenfe, fhould be in force; confequence would be, that the offender would be punifhed ice for the fame offence, contrary to the rule, *nemo bis pu-i debet pro uno et eodem delicto.*

Though after the preamble of 3 *Car.* it is enacted, that *Jac.* fhall be put in execution; yet the intent of that could y be to continue 1 *Jac.* for the punifhment of offenfes com-tted between that and 3 *Car.* for without this thofe offenfes uld remain unpunifhed, 1 *Jac.* being implicitly repealed. If *Jac.* continues, the punifhment defigned by 3 *Car.* though heavier, will be avoided, for if 1 *Jac.* prevents any eftate m vefting in the recufant, nothing can be forfeited by 3 *Car.* he cannot forfeit what he has not, and he can have nothing reafon of 1 *Jac.* But if 3 *Car.* is a repeal of 1 *Jac.* (as apprehend it plainly appears to be) it follows, that *Charles* ing never convicted, had a good eftate to make a tenant to e *praecipe*, and being himfelf tenant in tail under the fettle-ent of the firft Lord *Charles*, has by coming in as vouchee in recovery barred the remainder to the right heirs of Lord *arles*, under which the Duchefs claims. But if that recovery not good, yet the life of *Philip* who may poffibly conform, leave iffue capable, will ftand in her way; fo that, taking it her way, the judgment given below for the defendants was ll given, and ought to be affirmed.

Fortefcue replied. 3 *Car.* can be no repeal of 1 *Jac.* for ough the penalties are different, yet they are confiftent. The fference between a forfeiture and a difability is, that a for-iture can be applied only to what the offender has, but a fability cannot be forfeited. The books are full of cafes, wherein has been held, that a poffibility cannot be forfeited, or a ght. A difability is an incapacity in the offender to take any ate. *Nil dat quod non habet.* This cafe is like that of a nk, who on his deraignment may fetch back the eftate erefoever it is gone; and fo may *Philip* on conformity, or his e inheritable, enter upon the reverfioner in the cafe at bar.

Parker C. J. This feems to be a matter of great difficulty: o different conftructions of the act of Parliament have been up, *viz.* for the plaintiff, That the difability is total in the cufant, and no right at all of the eftate-tail fhall veft in him, t it fhall go over to the next iffue in tail capable; if there be ne, to the reverfioner; becaufe otherwife the recufant would able to defeat the intent of the act, which was to preferve e eftate to the heir or pofterity. That for the defendant is, at the compleat legal eftate fhall veft in the anceftor, be-aufe otherwife they who muft claim through him could not

take by defcent, fo that the intention of a benefit to the heir would be defeated that way.

Now both thefe, though they have a colour of being for the heir's benefit, yet tend to defeat it, and will not anfwer the intention. If the firft fhould prevail, that nothing vefted in *Charles* or *Philip*, but the eftate paffes over to the reverfioner; then the eftate-tail muft be totally determined. Then if *Philip* fhould have iffue capable (of which there is ftill a poffibility) they will be barred, for if the eftate-tail be once determined, nothing can fet it up again. Indeed where a man takes an eftate, and afterwards a more worthy heir comes *in effe*, who may take the fame eftate, it fhall deveft out of the former and veft in the latter: as if tenant in tail has two fons, and dies, the eldeft enters and dies, leaving his wife privement enfeint with a fon; the eftate prefently vefts in the younger brother, but as foon as the pofthumous fon is born, he fhall have it; but this is, becaufe both come in under the fame eftate-tail, and there is no determination of it: but he in reverfion can never enter, fo long as any right of the tail which he has granted out remains.

The other conftruction, by making the compleat legal eftate veft in the recufant anceftor, enables him to alien: fo that though the act fays the anceftor fhall be difabled to take for and in refpect of himfelf, and not for and in refpect of his heirs or pofterity; this conftruction enables him to take for his own benefit, contrary to the benefit of the heir. Confider therefore, whether there be not a middle way between thefe two, which may better anfwer the intention, (*viz.*) that the right of the tail fhall veft in the anceftor, fo far as is neceffary to convey the defcent to the iffue, but not to enable him to alien: then indeed, the defendants will have no title, but how can the leffor of the plaintiff enter in *Philip*'s life-time?

The act of 3 *Jac.* feems to be quite out of the cafe, being made for another purpofe.

The act of 3 *Car.* does concern the fame perfons and crimes (amongft others) with that of 1 *Jac.* but it is not therefore a repeal of it. It is objected, that it inflicts inconfiftent penalties; but why are they inconfiftent, fince one may have a proper operation upon fome eftates, and the other upon others?

I do not fee what advantage can be taken of the act of general pardon; for though it is a publick act, yet he that will take the benefit of it muft fhew how he is intitled to it, and that he is not within any of the exceptions; fo it fhould have been found.

Pratt J. The claufe which fays, that all eftates, terms, and other interefts, made to fuch recufant, fhall be void; does not indeed concern defcents, but purchafes: but confider whether an argument may not be drawn from thence, that the intent of the act was, that they fhould take no right, no intereft at all.

Paf. 2 *Geo.* it was argued a fecond time by Serjeant *Hooper* for the plaintiff and Mr. *Lutwyche* for the defendant.

Hooper Serjeant. The difability by 1 *Jac.* happened before any thing defcended either to *Charles* or *Philip*: it might have defcended to *Jofeph*, but he being dead without iffue, it reverts to the donor. The ftatute of 1 *Jac.* induces fuch a temporary difability, as prevents any thing from vefting. *Charles* and *Philip* were no lords, though the verdict calls them fo; for the ftatute difables them to take any hereditament, as a dignity is. Second argument.

As to the point, whether this act be repealed or not, it feems ftrange to imagine, that an act made with fuch deliberation fhould in two years after be repealed; efpecially if we confider what happened within thofe two years; the powder plot was then juft difcovered, and immediately an act paffed for a public thankfgiving for that deliverance; the confpirators are attainted, and then at the fame Parliament is this ftatute made, which is fet up for a repeal of 1 *Jac.* the great bulwark againft popery. Thefe have different operations, and may well ftand together; the one prevents eftates from vefting, and the other meddles with eftates vefted.

But fuppofing for argument fake, that which otherwife I can never admit, that 3 *Jac.* does amount to a repeal of 1 *Jac.* yet furely then the ftatute of 3 *Car.* has revived it; for it enacts it to be put in due execution, which plainly fhews it was not thought to be repealed by 3 *Jac.* or intended to be repealed by 3 *Car.* and it is to be put in execution as well againft crimes *to be*, as thofe actually committed.

The common recovery can have no effect, being fuffered by one who had no eftate in him at the time, and therefore could not by deed inrolled make a tenant to the *præcipe*. By deed inrolled (that is, by bargain and fale) nothing paffes but what may lawfully pafs, for it does not work a diffeifin or any *tort*. The act 1 *Jac.* is exprefs, that fuch perfon fhall be difabled to take: by the recovery he may extinguifh his right, but he cannot alien it, he has *jus extinguendi*, but not *jus alienandi*. On 1 *Jac.* the crown can have no right, becaufe nothing vefts in the party; and therefore if the father is feifed of lands in fee,

and the ſon is attainted of treaſon in the life of the father, and the father dies; the land ſhall eſcheat, for that the father died without heir, and the crown cannot have the land as a forfeiture, becauſe the ſon never had it to forfeit. 1 *Inſt.* 13. *a.* Here nothing is veſted in *Charles* or *Philip*, and ſo conſequently they can forfeit nothing. They have *ſcintilla juris* to preſerve the eſtate-tail, but not to forfeit or deſtroy it. The crown can never take but by record, either judicial or miniſterial, as in the caſe of an eſcheat the crown takes by office, which is a miniſterial record.

I come now to the chief point, whether the Duchefs can enter, living *Philip?* At common law before the ſtatute *de donis* all eſtates were fee-ſimple; and the ſtatute was calculated more for the benefit of him in reverſion, than the tenant in tail or his iſſue, for now the reverſion is certain, and the donor may limit as many remainders as he pleaſes, which he could not do before, for there could not be one fee-ſimple depending upon another; and the reverſion is now fixed, which before was but a poſſibility, for now the tenant in tail can neither bar nor clog the reverſion, except by a recovery which is not mentioned in the ſtatute *de donis*; ſince which there is no one ſtatute that gives the tenant in tail power to charge the reverſion. As to the caſe now before us, the ſtatute of 1 *Jac.* has repealed the ſtatute *de donis*, for by that *Charles* and *Philip* are made inheritable as iſſue in tail, but now by this latter ſtatute they are diſabled.

At common law before the ſtatute *de donis* a *formedon in reverter* did lie on failure of iſſue; and in our caſe if there are no iſſue inheritable to the eſtate, it muſt revert to us, who are the right heirs of the donor. If tenant in tail dies leaving his wife *priviment enſient* with a ſon, the eſtate-tail muſt revert to the donor, ſubject to the entry of a poſthumous ſon. (*C. J.* Have you any caſe to that?) *Hooper*, I did not look for any, thinking it conſtant experience.

This eſtate muſt go to the reverſioner, otherwiſe where can it go? The act of 1 *Jac.* takes away and abrogates not only all rules and maxims of law, but alſo all acts of Parliament prior to it, that are contrary and repugnant. 8 *Co. Prince's* caſe. That was a ſettlement of part of the duchy of *Cornwal* by act of Parliament, there the eſtate (as it has lately done till King *George* came to the crown) when there was no Prince of *Wales*, lay dormant for many years; and when there was a Prince of *Wales*, roſe again. In our caſe, if *Philip* ſhould have a ſon, he might enter; but in the mean time the eſtate muſt go over to the reverſioner. Some perſons are capable to take by purchaſe, that are not capable to take by deſcent;

but no cafe proves that one may take by defcent, that is difabled to take by purchafe.

Lutwyche contra: As to the firft point, whether any thing vefts in *Charles* or *Philip*: if the ftatute had intended to induce a total difability, there would not have been the faving claufe as to the heir; which implies, that the anceftor fhall be capable to take for the benefit of the heir. The heir is not to be a purchafer, but the anceftor himfelf, and confequently it muft veft in the anceftor, for otherwife it cannot defcend to the heir; be the inheritance either fee-fimple or fee-tail, the anceftor muft inherit, to tranfmit it to pofterity. If no eftate vefts, and it be an inheritance, where can the freehold be during the life of the offender? It cannot be in abeyance, and therefore the right of the intail fhall veft in the recufant, but the crown fhall have the profits.

Had this ftatute intended a total difability, it would have provided to whom the land fhould have defcended in the mean time, as in 6 *R.* 2. *c.* 6. 11 *H.* 7. *c.* 20. and 4 & 5 *P.* & *M.* *c.* 8. On 6 *R.* 2. the heir is a purchafer, but on the 11 *H.* 7. he takes by defcent. 3 *Co.* 37.

As to the *Prince*'s cafe, that was by act of Parliament; and refolved that it would not be good at common law.

It is objected, that if the offender has the eftate, he may deftroy it, and bar the iffue for whom the ftatute is fo careful. To this I anfwer: That if by this ftatute the eftate-tail vefts in him, a common recovery is as incident to his eftate, as alienation is to a tenant in fee-fimple. My Lord *Coke*, 1 *Inft.* 223. *b.* enumerating the feveral incidents to fuch an eftate fays, That the tenant in tail may fuffer a common recovery, and therefore, fays he, If a gift in tail is made, with condition reftrictive of fuch an incident, the condition is repugnant and void, for fuch a tenant has a right to turn the fee-tail into a fee-fimple for the benefit of his heirs, by barring ftrangers. C. J. Can he make a deed for a tenant to the *praecipe* without an alienation? *Lutwyche*, Such an alienation only with intent to fuffer a recovery, may not amount to fuch alienation as is prohibited within the intent of this ftatute. 4 *Leon.* 84. Land was given to an alien in tail, remainder to another in fee: the alien fuffered a recovery, and died without iffue; it was urged that the recovery was void, for that the alien was not tenant of the freehold at the time of the recovery fuffered, but the whole court held, that the recovery was good to bar the remainder.

 Another

Another queſtion is, whether the reverſion can be executed living *Philip?* 1 *Inſt.* 28. *a.* is, that if lands be given to a man and his wife and to the heirs of their two bodies, and they live till each be 100 years old, yet do they continue tenants in tail, for the law ſees no impoſſibility of their having iſſue. In our caſe, if *Philip* has any iſſue, he may inherit; but if the reverſioner once enters, he muſt enjoy it for ever, and then what becomes of the ſaving clauſe as to the heir?

C. J. Is there any caſe which proves that the eſtate ſhall not be diveſted out of the reverſioner?

Lutwyche. I could not find any. The iſſue in tail cannot enter in the life of the offender, and *a fortiori* the reverſioner ſhall not.

He inſiſted on 1 *Jac.* being repealed, and the diſability pardoned, as in the former argument.

Parker C. J. It has been inſiſted on for the defendant, that the clauſe in 1 *Jac.* as to the heir makes it neceſſary, that the legal eſtate ſhould veſt in the anceſtor, in order that the heir may convey a title through him; but it is conſiderable, whether the effect of that clauſe be not rather, that whatever difficulty would regularly ariſe to the heir from the anceſtor's not being ſeiſed, *that* ſhall not be any objection to the heir in this caſe. Not that the anceſtor ſhall be ſeiſed for his ſake; but his want of ſeiſin ſhall not prejudice the heir. The heir ſhall take the ſame advantage, as if the anceſtor had been ſeiſed.

It is contended that the diſabled perſon ſhall take by purchaſe in reſpect of his heir; but that is a notion I cannot underſtand, how he that cannot take for himſelf, can take by purchaſe in reſpect of his heir. The words *in reſpect of himſelf and not in reſpect of his heir* muſt be applied, *ſecundum ſubjectam materiam*, *i. e.* as the ſubject-matter of the clauſe will bear. The diſabled perſon is made incapable to take a perſonal eſtate by the ſame clauſe, but it is plain that other intervening clauſe cannot be applied to that, and ſo it ſeems to be in the caſe of purchaſes. No authority has been cited of either ſide, and it ſeems a very conſiderable queſtion, whether in the caſe of tenant in tail with a remainder over, the remainder being once veſted in default of iſſue in tail, can be diveſted by reaſon of iſſue after born. Suppoſe the caſe of a fee-ſimple, the land eſcheats for want of heirs; ſhall it diveſt out of the lord, and veſt in a poſthumous heir?

The

: ſtatute of 3 *Jac.* is entirely out of the caſe. 3 *Car.* in-
. penalty of another kind, *viz.* a forfeiture of the eſtate
: but if 1 *Jac.* be taken to be entirely repealed, then
will not provide for all the caſes that may happen; as if
leſcend after the diſability attached. Therefore the moſt
l conſtruction ſeems to be, that the firſt clauſe of 3 *Car.*
enacts that 1 *Jac.* ſhall be put in execution, leaves 1 *Jac.*
force and effect, as to all caſes not afterwards provided
3 *Car.*

: difficulty as to the Ducheſs's taking during the life of
ſeems the moſt conſiderable; for ſuppoſe the other part
; to the diveſting the eſtate out of the remainder-man were
the caſe, how can ſhe enter, while there is any iſſue in tail
ng? Suppoſe there had been a diſſeiſin, and ſhe was to
a *formedon*; muſt not ſhe lay it, that all the iſſue male of
dy of *Thomas* are dead?

s ſaid that *iſſue* muſt be *iſſue inheritable*, which *Philip* is
but he may inherit upon conformity, and iſſue inheritable
le, *ſub conditione*, is ſtill iſſue inheritable.

tt Juſtice. That objection indeed has the greateſt weight;
to the clauſe, *for and in reſpect of*, &c. that can have no
conſtruction, but that the anceſtor ſhall be diſabled, but
iſability ſhall not hurt the heir.

ability may be either total or temporary. *Total*, ſuch as
f an alien, would have prejudiced the heir. This is a
rary one, and therefore though the ſaving for the heir had
eft out, I ſhould have thought it muſt have had the ſame
uction, as it will now have; and regularly the diſability
l not have prejudiced the heir in all caſes. But ſuch tem-
y diſabilities may in ſome caſes by intendment be pre-
al to the heir, as in caſe lands in tail deſcend after the diſ-
y attached, and no iſſue in tail is then *in eſſe*, they muſt
er in that caſe. And ſo it ſeems to me it will be now,
ithſtanding the addition of that clauſe; if there be an
n tail capable of taking at the time of the deſcent, that
all have the land; but if not, he will be prejudiced by that
ent, and it muſt go over: at leaſt till ſome perſon comes
e capable of taking the eſtate-tail, the remainder-man ſhall
r, for the freehold cannot be in abeyance.

Hilary 3 *Geo.* it was argued a third time by Mr. *Reeve* for the
ntiff, and Serjeant *Cheſhyre* for the defendant. **Third argument.**

Mr. *Reeve*,

Mr. *Reeve.* The title of the Duchefs depends on three acts of Parliament, 1 and 3 *Jac.* and 3 *Car.* which were all made to prevent the growth of popery. And he argued, fhe had a good title under 1 *Jac.* which remains unrepealed, either by 3 *Jac.* or 3 *Car.*

1. It is not repealed by 3 *Jac.* Thefe two ftatutes relate to different perfons and different offenfes. 1 *Jac.* relates to all perfons, 3 *Jac.* only to children. In 1 *Jac.* the offenfe is paffing or being fent beyond the feas to be there educated; in 3 *Jac.* the offenfe is going without licence. The penalty in 3 *Jac.* is lefs than in 1 *Jac.* 3 *Jac.* is only the profits, in 1 *Jac.* the eftate itfelf is forfeited, and the reafon is, becaufe the offenfe againft 1 *Jac.* is greater than that againft 3 *Jac.*

2. The ftatute 3 *Car.* is no repeal of 1 *Jac.* The rule indeed is, *Leges pofteriores leges priores contrarias abrogant*, but thofe two ftatutes may confift together. Though both extend to the fame perfons, yet the penalties are different and confiftent. 1 *Jac.* works a difability to *take after* the offence committed, 3 *Car.* a lofs of what the offender had before the offence. If it fhould be conftrued, that 3 *Car.* is a repeal, then papifts will be bettered by that ftatute, for they will be reftored to their capacity of purchafing, which was taken from them by 1 *Jac.* neither can they be convicted upon 3 *Car.* if they will but be content to ftay abroad: no procefs can reach them there, for they can only be outlawed in the cafe of high treafon. 26 *H.* 8. *c.* 13. 5 *Ed.* 6. *c.* 11. 3 *Inft.* 32.

The ftatute therefore of 1 *Jac.* being in force, and the meafure between us, I come in the next place to confider whether any and what eftate vefts in the offender. If the ftatute had intended he fhould take by defcent, it would not have difabled him to purchafe for the benefit of the heir. In the cafe of a purchafer the lands muft veft in the anceftor, or elfe the heir cannot take. The offender is difabled in refpect of himfelf only, and not in refpect of his heir: whereas if it fhould be conftrued, that he may take by purchafe or defcent, it will then be in his power to bar the heir. If he takes any right, it muft be for his own benefit, and not barely *jus alienandi.* And when it is faid that admitting he does take, yet he has no advantage, becaufe he forfeits the profits; that may be avoided as I faid before, it being in his power to prevent a conviction on 3 *Car.* by his keeping beyond fea, and then the whole profits notwithftanding the ftatute may be applied towards the fupport of popifh feminaries.

It

If it be ſaid, that by conſtruction of law the crown ſhall have the profits during the diſability of the offender; I anſwer, that if the offender cannot take the eſtate, the crown cannot have the profits. 1 *Inſt.* 13. *a.* If the crown were to take the profits, it would be only a pernancy of them, as in outlawry in a perſonal action; and it would be in the power of the offender to deprive the King of the pernancy of the profits by his alienation. 21 *H.* 7. 12. *Raym.* 17. *Hardr.* 101. *Salk.* 395, 408. 5 *Mod.* 109. Whereas if it be conſtrued, that the offender is diſabled to take, he will be conſequently diſabled to alien, and then the act will have its full force.

It will not be improper under this head to conſider ſome of the diſabilities at common law, and compare them with the preſent caſe. 1. *Propter delictum*, as by attaint. 2. *Propter defectum ſubjectionis*, as an alien. 3. Profeſſion in religion.

1. The firſt of theſe works a forfeiture of the eſtate to the King for treaſon, and to the lord for felony; it corrupts the blood; the crown ſhall have the purchaſe of ſuch a perſon upon office found; and this diſability differs from that created by 1 *Jac.* 1. Becauſe that created by 1 *Jac.* is temporary. 2. Perſonal, and works no corruption of blood. 3. Becauſe an offender againſt 1 *Jac.* has no capacity to purchaſe, which one attainted has for the benefit of the crown.

2. An alien has no inheritable blood in him: he can have no heir, nor be heir to any man: he has a capacity to purchaſe, but not to hold, for upon office found the King ſhall have it. And this diſability differs from that under 1 *Jac.* becauſe on the one hand the iſſue of an offender may inherit, which the iſſue of an alien cannot, and on the other hand an alien may purchaſe, which our offender cannot.

3. The next diſability is that of a monk, or one entered into religion: that comes the neareſt to the preſent caſe. For, 1. The purchaſe of a monk is void, ſo is that of the offender. 2. Neither of them can inherit. 3. Their heir is not diſabled. 4. In both caſes the diſability is temporary, for the monk is reſtored upon his deraignment, and ſo is the offender upon his conformity. It is true, in 1 *Inſt.* 2. *b.* a monk is called *civiliter mortuus*, but that is only a ſimilitudinary expreſſion: that he is not a dead perſon is proved by his being reſtored upon his deraignment, he may be abbot, executor, bring and join in actions. 1 *Inſt.* 132. *b.* The diſability therefore of a monk comes very near the preſent caſe; and it is no foreign ſup-

ſuppoſition, to intend the Parliament deſigned to bring the offender under the ſame incapacity, as a monk, who tranſgreſſed no ſtatute, was under at common law. And the rule of conſtruction is always to be guided by the reaſon and practice in parallel caſes. 3 *Co.* 85. *b.*

The principal difficulties ſtarted in this caſe are two. 1. Whether the Ducheſs can enter in her remainder during the life of *Philip*, who is iſſue in tail though diſabled. 2. In caſe ſhe may, whether upon *Philip*'s conformity or leaving iſſue inheritable, the eſtate can diveſt out of her, and *Philip* or his iſſue enter.

1. As to the firſt: Suppoſing then *Charles*, *William*, and *Philip* diſabled to take this eſtate: ſince *Charles* and *William* are dead without iſſue, *Philip* is now the only perſon who, as heir male of the body of *Thomas* firſt Lord *Gerard*, is next in remainder by virtue of the ſettlement, and the diſability as to him being before the eſtate devolved upon him, it muſt go over to the next in remainder, who is the leſſor of the plaintiff. The law will never caſt a deſcent upon one that is attainted, though he may hold what he acquires by his own act, till office found. 1 *Ven.* 417. 1 *Inſt.* 13. *a.* *Fitzh. Mortdanceſtor* 47, 55. The ſecond ſon recovered, becauſe the firſt was beyond ſea. *Carter* 198. 3 *Co.* 10. *b.* 3 *Cro.* 28. 9 *H.* 6. 24. *b.* 3 *Co.* 61. *b.* Grandfather tenant in tail, father attainted, grandfather dies, the iſſue of the father may enter. The Ducheſs does not claim by deſcent from the diſabled perſon, but by virtue of the remainder limited to the right heirs of Lord *Charles*, upon this preſumption, that the former remainders are all extinct, *Philip* ſtill continuing under the ſame legal incapacity.

2. But the greateſt objection is, that the ſtatute having provided, that the land which deſcends to ſuch an offender ſhall not eſcheat, neither ſhall the iſſue be hurt; if the eſtate was to go over to the reverſioner, the iſſue of *Philip*, or he himſelf conforming, cannot take, for the eſtate is gone.

Anſwer. The ſtatute ſays, the offender upon his conformity ſhall be reſtored to his capacity as before, but doth not ſay he ſhall be reſtored to what he forfeited by the diſability.

But admitting he is deſigned to be reſtored to all upon his conformity, then I inſiſt he may call for the eſtate, and ſo may his iſſue, though it be gone over. It is a maxim in law, that a freehold cannot be in abeyance. 1 *Inſt.* 342. *b.* It cannot be in *Philip*, by reaſon of the diſability, nor in the crown, *Philip* never having been in poſſeſſion, and there being no

no provision in the statute for that purpose: nor in the Lord, for the whole estate is not spent; and therefore it must be cast upon the reversioner, the law being careful that the freehold shall never be in abeyance, 5 *Co.* 52. *b.* *Bro Escheat* 33. *Prerog.* 947. 1 *Inst.* 2. *b.* *Philip* therefore being disabled, the next in remainder, who is the lessor, must enter to preserve the estate.

Plow. 486. *b.* is, That after an attainder of treason, and till office found, the freehold shall be in the person attainted so long as he lives, and he shall be tenant to every *praecipe*; but when he dies the land cannot descend to the heir; for his blood is corrupted; and it cannot be in the King till office found, and therefore till then it shall escheat to the Lord, as upon the death of his tenant without heir; though part of that case be denied for law in 3 *Co.* 10. *b.* for there it is said, that by the common law for lands in fee-simple, and by 23 *H.* 8. *c.* 13. for lands in tail, the actual possession was not in the King till office, but when tenant in fee-simple is attainted and dies, the fee and freehold without any office are thrown upon the King (though not held immediately of him) to prevent an abeyance, and the land shall not escheat to the Lord till office, for in all cases the escheat for high treason is to the King. But if tenant in tail is attainted and dies, it shall not vest in the King before office, for neither the attainder nor the statute work any corruption of blood as to the descent of lands intailed; but now the statute 32 *H.* 8. transfers and vests the actual possession in the King by the attainder, as well in the life as after the death of the person attainted, and as well of lands in tail, as of lands in fee. So it is if an alien dies, the freehold is presently in the King, without office. 5 *Co.* 52. 8 *Co.* 76. *Plow.* 229.

The issue may very well take after the death of *Philip*, for though the Lord has entered by escheat, yet a person claiming paramount to him may enter and oust the Lord. 3 *Inst.* 231. 49 *E.* 3. 16. 8 *Co.* 76. *b.* *Fitz. Mortd.* 46. 2 *Inst.* 183. *H. P. C.* 322. The issue in tail shall never be hurt by the disability of the tenant in tail; *Philip* by his own act shall not hurt the issue, be the estate gone over to the reversioner, or Lord by escheat; and that was the design of the saving.

A reversion must take effect at the instant the particular estate is determined. If the eldest son dies seised leaving his wife *privement enseint* with a son, and the second son enters (as he must) and afterwards a posthumous son is born, he shall enter upon his uncle, and so shall a posthumous issue upon the Lord by escheat. *F. N. B.* 195.

It

It has been objected, that the Duchefs cannot make out her title in a *formedon in reverter*. But why not? fhe need only fet out her pedigree, and allege the death of the donee in tail without iffue; and that would bring it to the queftion, whether dying without iffue capable of taking is not in law dying without iffue. 8 *Co.* 88.

The recoveries fuffered by *Charles* are of no effect, for if he was difabled to take the eftate, he could not make a tenant to the *praecipe*, and then the recoveries are void.

The ftatute therefore of 1 *Jac.* being in force; no eftate vefting in a perfon difabled, and no recovery by him fuffered being good; fince *Philip* by reafon of the difability cannot take, but upon his conformity may be let in, or leaving iffue capable, that iffue may take notwithftanding the eftate is gone over: to prevent an abeyance the leffor of the plaintiff fhall take, and fo had a good title to make the leafe.

Chefhyre Serjeant *contra*. The queftion is whether the remainder limited to the heirs male of the body of *Thomas* be extinct, fo as the fubfequent remainder to the right heirs of Lord *Charles* fhall take place. If the firft remainder be not extinct, the title is with the defendants by reafon of their poffeffion.

Under 1 *Jac.* we fay, the difability does not prevent the vefting of the eftate, but relates only to a pernancy of the profits, which will better anfwer the end of the ftatute in encouraging conformity than lofing the whole eftate without a poffibility of being reftored: his conformity is in the nature of a condition precedent, which if he performs he ought to reap the benefit of it. On the one hand it will be an encouragement to the offender to be reftored to a pernancy of the profits, whereas on the other hand if he fhould not be reftored, he will have no encouragement to conform.

The effect of the recoveries is out of the cafe, for *Philip* claims paramount to them, and it would be hard his iffue fhould fee the eftate go over, and be put to a difficulty to convey a defcent to himfelf, and get back the land from him in remainder. There is no law which reftrains papifts from felling their eftates; on the contrary it ought to be encouraged, for by that the proteftant land intereft is ftrengthened.

The crown fhall have the profits during the difability of the offender, for the profits of the land are forfeited to all purpofes of

›enefit, as much as if the land itself were forfeited. By a nt of the profits the land passes. 3 *Lev.* 289. 1 *Inst.* 4. *b.*

The government sought not the estates of the offenders, but ir conformity. If a minor under the guardianship of his le, who is his next heir, be sent abroad by him; if it should construed that the estate is gone, then the uncle who was greatest offender would reap the benefit (*a*). Whereas if land vests and the profits only are forfeited, it will be as great drance to childrens going beyond sea, and no encourage-nt to the guardians to send them, and then too there will be abeyance.

(*a*) *Sed N. B.* 3 Car. reaches him too.

The reason why the punishment under 3 *Car.* is less than *Jac.* (for he put 3 *Jac.* out of the case) is, because 1 *Jac.* made upon a pinch, and when the bent of the nation was inst the papists, and when that occasion was served, it was ught proper to mitigate the penalties.

This disability cannot amount to a refusal, so as to make estate go over, for the offender could not bar his issue by tter *en pais.* The divesting and revesting estates is not fa-ured in law. 1 *Co.* 87. 22 *E.* 3. 19. *Hob.* 336, 346. tz. *Dower* 143. *Maynard* 161. If the estate should be sent er, it can never be brought back again, and then the pro-sion in benefit of the heir would be to no purpose.

At common law profession in religion was equivalent to death: was a civil death, and a *formedon* would lie, *eo quod suscepit per se habitum religionis, in quo habitu professus fuit.* 1 *Inst.* 33. *F. N. B.* 196. And a writ of *Mortdauncestor* would lie pon such a suggestion.

I admit the posthumous issue in tail may enter upon the re-rsioner, for he only takes *pro hac vice* to prevent an abeyance, which there is no danger in the case at bar, if our con-ruction prevails.

He insisted likewise on the matter of the pardon and the life *Philip.*

The court said nothing, taking this to be the last argument: nd so it stood two terms upon a *curia advisare vult.* But en understanding, other counsel had been retained to argue, occasion; they desired to hear them. And *Trin.* 4 *Geo.* *Parker* C. J. being made Lord Chancellor, and *Fortescue* come own into the King's Bench) it was argued a fourth time by Sir

Sir *Thomas Powys* for the plaintiff, and Sir *Edward* for the defendant.

Fourth argument.

Sir *Thomas Powys*. In order to make a title in the upon this record, I shall endeavour to prove, that Lor being educated in a foreign popish seminary, and co a papist to the time of his death, was by the statute of 1 *c.* 4. disabled and made incapable to inherit any legal est consequently the recoveries suffered by him are void, effectual to bar the remainder under which we claim; *Philip* continuing under the same disability, the estat spent, and the duchess must enter as in her reversion.

For this purpose I shall consider these three things. will be the consequence upon the statute of 1 *Jac.* t singly and by itself. 2. What alterations have bee by any subsequent statutes. And 3. What influe common recoveries and the life of *Philip* will have in p of the Duchess's title.

1. Then, to take 1 *Jac.* by itself, and consider it in re this case. Upon this statute it is that we must make our f I must admit that the common recoveries, and the life c will be objections against us, unless we can have the a of this statute to remove them. And as this is to be ou dation, it will be proper to observe the time and occ making it.

It is very well known, that during Queen *Elizabet* the papists were very active in finding out means to ruin testant religion, or, in the language of those times, to f pope's battles. Amongst other expedients that were the and put in execution, this of erecting popish seminarie reign parts for the education of the *English* youth was o principal contrivances of the papists to bring about thei and therefore the government at that time was very vi prevent the ill consequences of it. And to that purpo was made 27 *Eliz.* *c.* 2. which being very doubtful and in many respects, and thought by some to be but a tempo which expired by that Queen's death, it had not the i effect.

Immediately upon King *James*'s accession to the thr statute we are now upon was made, as an effectual p against so great a mischief. And as the mischief was grea Parliament thought there was no time to be lost in puttin to it, and therefore one of the first things they set the about as soon as they came together, was to apply a proper

to this mifchief. This early care of theirs will be fufficient to filence any infinuations, as if this was but a trifling and an infig-nificant attempt, and not defigned by the Parliament to bring the papifts under thofe difficulties, which it is objected will be the confequence if our conftruction prevails: in anfwer to which they of the other fide fet up a conftruction, which tends only to make this (as they call it) a ftill-born ftatute. I need not mention the rule laid down in *Hob.* 87, 93, 97. that an act of Parliament fhall never be conftrued to be void, if it can pof-fibly be otherwife; but fhall be expounded in fuch a manner, that it may as far as poffible attain its end.

The ftatute has a two-fold operation. 1. To create an inca-pacity to take any eftate, under the words, *be difabled and made incapable to inherit, purchafe, take.* 2. To prevent the enjoying any eftate vefted before the offenfe, implied in thefe words *have or enjoy.*

The whole claufe runs, "That every fuch perfon fo paffing " or being fent, *&c.* fhall, as in refpect of him or herfelf only, " and not to or in refpect of any of his heirs or pofterity, be dif-" abled and made incapable to inherit, purchafe, take, have, or " enjoy any manors, lands, *&c.*" And then follows the pro-vifo for conformity.

It is the firft part of thofe words creating the difability *to take*, which is what we rely upon, for the offenfe was committed by *Charles* and *Philip* before the defcent of the eftate to either of them; fo that what might be the conftruction of the ftatute as to eftates *vefted* will not need to be now confidered, being en-tirely foreign to the prefent queftion.

The words *be difabled to inherit, purchafe, take*, are very ftrong and fignificant, and without doubt would have been fufficient to have hindered any eftate from vefting in the difabled perfon, if the ftatute had not gone on, and made provifion for the benefit of the heir. The word *inherit* would have prevented any defcent to the offender, and the word *take* would have ftopped him from claiming as a purchafer. The words in Lord *Delaware*'s cafe are not fo ftrong, and yet the dignity was held to be fufpended, and he no baron, but only an efquire. The ftatute of 11 & 12 *W.* 3. *c.* 4. is penned in the very fame expreffions, and upon that it has been held, that no eftate would pafs to a papift by any conveyance whatfoever. The words of 31 *Eliz.* againft fimony have been conftrued to create fuch a difability, as that the prefentee cannot bring an ejectment, or fue for tithes; and yet the words there are not heaped up fo elaborately as in our ftatute.

But it is contended, that the words, *in respect of himself only and not in respect of his heir*, do restrain and qualify the others, and shew the estate was designed to vest in the ancestor, in order to enable the heir to take.

To this I answer, That they are not to be considered as words restraining the former: if it be any, it must be but a partial restriction, as to lands, tenements and hereditaments only, and not to leases, goods or chattels, which the heir has nothing to do with; and it is absurd to say they shall qualify as to part, and not throughout. This saving the right of the heir, enures only as an exception of the heir, and leaves the statute to run *in non exceptis*, for the exception helps to prove the rule, and shew that the offender himself was designed to be left under the utmost force of the former words.

The offender himself was the person principally aimed at; the care of the heir was but a secondary intention, and therefore the first is not to be overthrown to make way for the second. But say they, what use then will you make of this saving? were the words added with no view or design at all? I answer, They were put in only *in majorem cautelam*, to satisfy every body, that only a personal disability was intended: they were not added as necessary, but to prevent any doubts which might arise in prejudice of the heir, and as my Lord *Coke* says, To satisfy ignorant men, and also to clear any suspicion, as if the Parliament intended to resemble this case to that of an attainder, and so cut off the communication between the ancestor and heir. If the other side will have us find out some use or other for these words, what can it be, but only to enable the heir to make out his title through one who was never seised?

But surely it is no consequence, that because the disability is not to run upon the heir, therefore the estate must vest in the disabled ancestor. This would be entirely to overthrow the statute, for then, contrary to the words, he will *inherit* and *take*. And if he be allowed to inherit and take, they must at the same time give him a power to alien, and by this means he will be enabled to prevent any discovery of his offense, for none but the next heir will take that advantage, and if he does, the other knows how to revenge himself.

In order to overthrow our construction, and yet leave the act to have some effect, it has been insisted for the defendants, that the statute only creates a disability to take the profits.

To

To this I anſwer; that there are no words in the ſtatute which look that way; it is perfectly ſilent as to any ſuch thing; and can it be imagined, that if the legiſlature had intended ſo, they would not have adapted the words to ſuch an intention? Can any one think they would throw in clauſes out of abundant caution in one place, and yet be entirely ſilent in ſo material a point as this? The ſtatute diſables them from taking or enjoying goods and chattels in the ſame clauſe which relates to lands; now nobody can have the profit of goods and chattels, but he who has the property, and the offender cannot have the property by reaſon of the ſtatute; ſo that conſtruing the profits only to be forfeited can go but to part, and it is abſurd to create diſtinct diſabilities as to the real and perſonal eſtate, when the ſtatute has coupled both together, and made no diſtinction between them.

The ſtatute ſays the offender *ſhall not take*. The defendants by their conſtruction ſay he *ſhall take*, and ſo they give the ſtatute an operation as to a pernancy of the profits, a matter in which it is ſilent, and this is to overthrow the plain ſenſe of the words, which diſable him from taking the eſtate.

And as it is pretty extraordinary to think the ſtatute deſigned only that the pernancy of the profits ſhould be forfeited; ſo it is much more extraordinary, that if they had ſuch a deſign, they ſhould take no care to diſpoſe of them elſewhere, or name the perſon they intended ſhould have them during the diſability. The ſame Parliament were ſo far from thinking *that* a matter proper to be left undetermined, that when by the ſtatute of 3 *Jac.* they diſabled an offender againſt that ſtatute from enjoying any eſtate, they immediately directed the next proteſtant of kin to take the profits: if they had any ſuch deſign in our ſtatute, they would have expreſſed it in the ſame manner; but they very well knew, they had no occaſion to direct the application of the profits, when they had before diſpoſed of the whole eſtate.

They endeavour to ſupply the want of a direction to whom the profits are to go, by telling us, that by conſtruction of law the crown ſhall have the profits, becauſe this is a publick offenſe, and not to the detriment of any particular perſon, according to the caſe of *Woodward* v. *Fox*, 2 *Vent.* 187, 267.

If this was to be allowed, I know no uſe the ſtatute would be of; the profits could only be forfeited as in outlawry in a perſonal action, and it would be in the power of the offender to deprive the King of the pernancy of the profits by his alienation; not to mention the prejudice that would accrue to

the heir; whereas if it be conſtrued, that the offender is diſabled to take, he will be conſequently diſabled to alien, and then, and not till then, the act will have its full force.

But whilſt we are arguing to preſerve the eſtate for the heir, againſt the alienation of the anceſtor, we are told, that we are endeavouring to defeat one great end and deſign of the ſtatute which was to ſtrengthen the proteſtant landed intereſt; for ſay they, give us the eſtate that we may alien it to a proteſtant, and that will be a means to work us out of the kingdom. To this, I muſt obſerve, that it is a little unlikely, they who are ſo ſolicitous to get the eſtate, will be ſo willing to part with it. To what purpoſe ſhould they argue themſelves into the eſtate, if they can ſo readily leave it as ſoon as they have it? They can never be in earneſt when they tell us, they only deſire the eſtate to have an opportunity to ſhew the world how generouſly they can relinquiſh it. They who argue in this manner, muſt diſtinguiſh between a purchaſe and a deſcent; for when they contend for lands by deſcent, in order to hand them over to a proteſtant; they can never mean, to ſecure to themſelves a power to alien to one of their own religion: that would be to make him a purchaſer againſt the expreſs words of the ſtatute, and would alſo overthrow that plauſible pretence of theirs, of ſtrengthening the proteſtant landed intereſt; for if they may alien at all, they muſt have a general power, and then it can hardly be ſuppoſed they will turn their backs on their own religion, in order to propagate hereſy, and root out themſelves.

If the gentlemen who argue in this manner are really in earneſt to advance the proteſtant intereſt, I can ſhew them a way how it may be done more effectually than that they are now in; it is only by keeping the eſtate from ever veſting in a papiſt, and giving it away to the next perſon capable of taking it. This is a plainer and eaſier way to bring about what they pretend to have ſo much at heart; for if the proteſtant intereſt be beſt advanced by working papiſts out of their eſtates, then I am ſure that end will be eaſier effected by keeping them out entirely, than by letting them in upon a bare promiſe, how ſpecious ſoever, of ſurrendering their eſtates, when required.

When any great miſchief is intended to be remedied, ſuch a conſtruction muſt be made as will tend the moſt effectually to prevent the miſchief. The miſchief is, that children go beyond the ſeas for a popiſh education. Now, if our conſtruction prevails, the offender will be in a manner cut off from his own family and his native country: he will be in many reſpects as an

an alien, exile, or one profeffed; and the bringing all thefe difabilities upon him will be a means to deter him from going, and then the end of the ftatute is anfwered. In making this conftruction we go along with the words and reafon of the ftatute, but they on the other fide in their expofition leave both behind them, and under pretence of finding out a plain, eafy operation for the ftatute, they fet up an imaginary conftruction of their own, which I have before fhewn tends only to overthrow it.

But this milder conftruction of the difability and finking it below the words ought not to prevail for thefe reafons. 1. Becaufe it is contrary to the rules laid down in expounding ftatutes made for the advancement of religion, for *fumma eft ratio quae pro religione facit.* Such ftatutes, fays my Lord *Hobart* in *Colt* v. *Glover*'s cafe, are to be extended even beyond the words. And fo is 11 *Co.* 70. *Magdalen College* cafe, where there are many inftances of this nature. There words, fhort and imperfect in themfelves, were carried beyond the letter to attain their end, but we are told in this cafe, though the words are full and exprefs, yet the fenfe is to be foftened and mitigated. 2. Becaufe it is contrary to the rule of expofition of ftatutes made to prevent any great mifchief in the commonwealth, or which enact any thing to its benefit. In 11 *Co.* 34. *a.* it is faid, that fuch ftatutes, though penal, fhall be taken by intendment, and he inftances even in criminal cafes.

This cafe comes under both thefe rules: the mifchief defigned to be prevented by the ftatute ftrikes both at our religion and civil government, to have our youth educated in feminaries of jefuits, where they acquire the greateft inveteracy againft both.

The rule of the civil law is, *in dubio legis intentio non verba valent,* but no rule can be fhewn, that where words are plain, and exprefs, an intention fhall be prefumed contrary to the words. I believe, if a common perfon was to read this ftatute, he would not be able to raife any doubts upon it, though lawyers we fee have.

When we have drove them out of all their holds, then they refort to the faving in the ftatute as their laft refuge; and argue, that becaufe the eftate is faved to the heir, therefore it fhall veft in the difabled anceftor. But furely this would be a very ftrange expofition, to draw fuch an inference from the living words of a ftatute, as will overturn and deftroy the very purview itfelf. And thus they who are fo folicitous to fet up the faving for the benefit of the heir, are all the while doing him the greateft mifchief; for if the anceftor has the eftate, he muft have it with a power to alien, and this will

enable him to keep all under him in subjection; for if the protestant heir goes to take the advantage, he will sell; if he be a remainder-man, he will suffer a common recovery, and revenge himself that way. There is no need in constructions upon such statutes to give the estate to the ancestor, for in Lord *Delaware*'s case the peerage never vested in *William*, and as the book takes notice, he was but an esquire, and yet the dignity descended to *Thomas*.

They ask us, If the estate is not in the offender, where is it? To this I answer, that certainly it is not in the disabled person, if it can go any where else; for that would be *maledicta constructio quae corrumpit textum*. In *Hob.* 87. it is said, that an act of Parliament may indeed be void, but not if by any possibility it can be otherwise; and that whatever is a necessary consequence of a statute, is as much a part of it, as if it had been contained in the body of it. *Hob.* 293. It may make a felony, and *Bro. Corone*, it may operate as a pardon by intendment.

Again: Where an act of Parliament has made any new point, the Judges are to construe it so as to make it practicable, though it thwarts some of the maxims of the common law; for that is the main business of all acts of Parliament, to correct the common law; and if a statute be inconsistent with the common law, and both cannot stand together, then the rules of law must give place to the statute, and not the statute to them.

I must admit it to be a good rule in expounding statutes, to go as near the common law as we can, provided we do not set up the latter to destroy the former, but blend them one with another as long as they will hold together, and when they grow inconsistent, then the common law is to be rejected.

To see then where the estate is, let us first consider where it is not. It is not in the offender, by reason of the statute, as I have before shewn; and if not in him, then there can be no pernancy of the profits in the crown; for 1 *Inst.* 13. a. where the son was attainted, living the father, it was held, the King could not claim by escheat, because the son never had any thing. It cannot go to the heir of the offender during his ancestor's life, for *nemo est haeres viventis*, and therefore since it cannot go any where else, it must return to us, who are the reversioner, as to the first mover. Thus estates are supposed to have first moved from the lord, and therefore when the tenant dies without heir, it goes back to the lord by way of escheat. So of estates-tail; if nobody be capable to take them up, the donor must enter as in his reversion.

To

To this they object the proviso in the statute, for conformity: and ask us how they shall have back their estate again, in case they should conform.

This admits of two answers: 1. It does not appear that this proviso has any retrospect, or words of restoration in it: it only makes him from thenceforth capable of taking an estate, but does not provide that he shall be as if he was never under any disability. He loses what should have vested during his recusancy as a punishment for it, and his conformity is as a condition precedent to his taking any future estate. When he has lived as a recusant all his life, it is not reasonable, that a feint conformity at the last should put him in the same condition with those who have been always innocent. 2. But admitting that the offender is designed to be restored to all upon his conformity, then I insist that he may call for that estate which passed by him during his disability, for the same act which incapacitates him to take, may put him *in statu quo* on its own terms. One act may attaint a man, and another restore him upon condition; and why may not the same statute do as much? There is no more difficulty in shifting the estate from the reversioner to the conformist, than in the *Prince*'s case from him to the crown, and so back again when there is a new Prince of *Wales*, which desultory kind of inheritance has been held good. In the Earl of *Derby*'s case in *Raymond*, it is laid down, that where estates are limited by a statute for particular purposes, they are not to be measured by the rules of law, else says the book, how could the *Prince*'s case be law, but that the Judges were obliged to go according to the act.

Thus according to *Beaumont*'s case, 9 *Co.* and *Hob.* 257. estates-tail may cease and rise again. It is one of the maxims of the common law, that a freehold cannot be in abeyance, but yet we know, in cases of necessity, the contrary is every day's experience: as where a parson dies, the freehold is in abeyance. *Litt.* § 646, 647. So where houses are annexed to offices: and the like of estates-tail. *Lit.* § 649, 650, 613. 1 *Inst.* 331. *a.* 345. *a.* So there may be a moveable fee-simple both as to persons and as to place. A man may be passed over as a person not *in esse*, as a monk who is *civiliter mortuus*, who may notwithstanding upon his deraignment enter upon the reversioner. 2 *Roll. Abr.* 150. *B.*

Suppose tenant in tail dies, leaving his wife *privement enseint* with a son; this shall not hinder the reversioner, but that he may enter till the birth, and at the birth the tail shall revive; or the expectation and presumption that there may be a child

 shall

ſhall not keep the freehold in abeyance. 7 *Co.* 8. *b.* And from hence we may argue *a fortiori*, that any expectation of conformity ſhall not keep us out, ſince that is more unlikely than the birth of a child *en ventre ſa mere*. I ſhall leave this firſt point with inculcating that the incapacity in our caſe is *to take*, and not barely to *enjoy*.

2. It being thus eſtabliſhed that the act of 1 *Jac.* has created an incapacity to take: the next thing to be conſidered is, whether any ſubſequent ſtatutes have altered the law in this point, and taken off the diſability.

It is not contended on the other ſide, that there ever was any expreſs repeal of this ſtatute; but the moſt they pretend to is, that it being inconſiſtent with the ſubſequent ſtatutes, it is implicitly repealed, according to the rule, *leges poſteriores leges priores contrarias abrogant*.

Before I enter upon the conſideration of the conſiſtency or inconſiſtency of the three ſtatutes, I would obſerve, that repeals by implication are to be uſed very tenderly, becauſe they infer a very high reflection upon the law-makers, as if heedleſly and unknowingly they made contrary and inconſiſtent laws. 11 *Co.* 63. 1 *Roll. Rep.* 91.

It was given up in *C. B.* and agreed to in this court, that 3 *Jac.* relates to different perſons and different offenſes from 1 *Jac.* and therefore I ſhall paſs it by and take no notice of it.

The ſtatute of 3 *Car.* is that which is ſet up by the other ſide to be the governing act, and an implicit repeal of 1 *Jac.* notwithſtanding it enacts it to be put in due execution, which is ſufficient to ſhew it was not intended as a repeal.

It was ſaid upon a former argument, that 1 *Jac.* was made upon a pinch, and when the bent of the nation was againſt the papiſts, and it being very ſevere upon them, 3 *Car.* was made to mitigate thoſe penalties. In order to anſwer this pretence I muſt reſume the hiſtorical part of the caſe, and conſider the circumſtances of the nation at the time of making this latter ſtatute. During Queen *Elizabeth*'s and King *James*'s reigns the people were very jealous of the deſigns of the papiſts, and therefore we ſee endeavoured by ſeveral acts of Parliament to fence againſt them: upon King *Charles*'s acceſſion to the throne, their ſuſpicions were rather increaſed than diminiſhed; that Price was then newly married to a daughter of *France*, a *Roman* catholick, and ſeveral favours were at that time ſhewn to the papiſts: this occaſioned great diſquietude,

quietude and uneasinefs to thofe of the proteftant reformed religion, which afterwards broke out into an open rebellion, and ended in the murder of that Prince, and the banifhment of his fon. It is well known, that the Parliament which enacted this law was far from being acceptable to the court, and therefore it was fuffered to continue but a fhort time, and then followed the long intermiffion of Parliaments: as this Parliament was not in the intereft of the court, fo they were highly incenfed againft the papifts, who they began to fear were likely to gain ground, and therefore they fet themfelves at work to attack them in that which was their weakeft place, namely in taking away the eftates vefted *before* the offenfe, as to which the former ftatute was doubtful; fo that now they were able to meet with them both ways: by 1 *Jac.* they prevented the *vefting*, and by 3 *Car.* the *keeping* any eftate after the offenfe. Now if it fhould be conftrued, that the meafure of all thefe difabilities muft be by 3 *Car.* then that Parliament, inftead of diftreffing the papifts as was intended, has rendered their condition more eafy; for on 3 *Car.* a conviction is requifite, to avoid which they may keep abroad, and have the profits of their eftates tranfmitted to them, for they will be out of the reach of any procefs neceffarily previous to a conviction.

But the main end and defign of this latter ftatute (which has not yet been mentioned) was to lay a heavier punifhment upon the perfon *fending*, who before forfeited 100 *l.* only, and the child *fent*, who was the moft innocent, bore all the refentment of the ftatute; whereas both are now put upon the level, and fome new difabilities are created, as from being executor, &c. and it alfo extends to private fchools, which the others did not.

3. I come now to confider what influence the common recoveries and the life of *Philip* will have in prejudice of the Duchefs's title.

Now as to this point, what I fet out with will principally govern it, for if the fecond *Charles* never had the eftate in him (as upon my former reafoning I apprehend he never had) then the recoveries will be void, and fuffered by a perfon out of poffeffion; as if the iffue in tail fhould fuffer a recovery in the life-time of his father: a fine indeed he may, but that is by the exprefs provifion of the ftatute 32 *H.* 8. *c.* 36.

As to the life of *Philip*, my objections againft the eftate's being in abeyance, and the way I have fhewn how he, or his iffue, may be reftored upon conformity, will be fufficient to remove that obftacle.

But

But to come closer. Say they, whilst there is issue the reversioner cannot enter. I deny that in this case. *Issue* must be heir of the body, *Hob.* 346. *Dy.* 332. *a.* *Plow.* 560. and he must be issue inheritable, which *Philip* is not: he, as I have before shewn, is disabled, and cannot call for the estate; according to 1 *Ven.* 417. he is to be considered in consanguinity, but not as heir. And if he cannot take, then his issue cannot, (admitting him to have issue, which is not found, neither is it so in fact, so that the argument is only from a possibility of his having issue) for it is not enough that he is issue, unless he be heir of the body to claim the intail, and heir of the body he cannot be in the life of *Philip*, for *nemo est haeres viventis*. My Lord *Coke*, 1 *Inst.* 377. *a.* puts the case of tenant in tail to him and the heirs male of his body, he has issue a daughter, who has issue a son; the grandson, says he, shall not keep out the reversioner, though he be heir of the body, because he does not derive his descent through males. It is said of an exile, *quod perdidit patriam*, and it will sound as well to say of *Philip quod perdidit patrimonium*.

We are not obliged to wait for the possibility of his conforming. Shall an estate stand suspended, because it is possible an alien may be naturalized, or a monk be deraigned? Even in the case of an infant *en ventre sa mere*, which is stronger, the estate goes over till the birth. *Cro. El.* 422. 1 *Inst.* 391. 29 *Ass. pl.* 61. *Plowden* 557. indeed says, there might be an occupant in that case cited out of the book of *Assise*, but that was only said *arguendo*, and is contrary to *Yel.* 9. 2 *Roll. Abr.* 151, 152. for he must claim by a *que estate*. If an advowson be granted to *A.* for the life of *B.* and *A.* dies before a vacancy, the grantor shall present, and there shall be no occupant.

The next thing relied upon by the defendants is the act of general pardon, 2 *W.* & *M. st.* 1. *c.* 10. which, say they, has cured all. This has been sufficiently answered by those who have argued before me; as there are exceptions in it, and it is not found, the court will not take notice of it. *H. P. C.* 252. *Cro. El.* 125. 1 *Keb.* 20. 1 *Lev.* 26, 76. *Bro. Charter de Pardon* 46. *Pleading* 124. 8 *E.* 4. 7. 4 *H.* 7. 8. *b.* The general words might pardon the offense, but would not restore the forfeitures without special words. 1 *Lev.* 120. 1 *Saund.* 362. If simony be pardoned, yet that does not operate so as to restore the offender to the living. 5 *Mod.* 15.

The last thing they object to us is, that *Charles* was in possession all his life, and therefore the recoveries are good: but was this any other possession than that of a wrong doer? A monk might

ight be a diſſeiſor, but yet it will not be pretended he had any gal eſtate in him; no, he was at beſt but an occupant, and in is caſe *Charles* was no more; he had it is true a *pernancy* of the ofits, but that is all; he had not ſuch a poſſeſſion and free-ld as enabled him to bar the remainder by coming in as uchee in a recovery. I deſire to know, whether it will be pre-nded, that if a papiſt ſince the 11 & 12 *W.* 3. *c.* 4. ſhould t into poſſeſſion, and receive the profits of any eſtate, whether ſay he can be deemed to be in legal actual poſſeſſion? Certain-he cannot: he cannot take advantage of his own wrong, and o more ſhall the tortious entry of *Charles* (for ſuch it was) enure his benefit, and turn to the prejudice of us, who are in re-erſion.

There is one thing more which they preſs upon us, and that is, that we can ſhew no inſtance where this act has been put in ecution in the manner we are contending for, or indeed in any other manner. I may retort the argument upon them, and emand to know, if they can produce any caſe which ſeems to ook their way, or ſo much as countenance the conſtruction they have ſet up: the truth is, the matter is ſtill at large, and no ar-gument can be drawn by either ſide from the diſuſe of the ſtatute. Many ſtatutes there are in full force, upon which there are no footſteps for many years. And as to this particular ſtatute, I can give them a very good reaſon why it was never yet drawn in queſtion; they of the ſame religion will never take advantage of it, and theſe are the people who moſtly have it in their pow-er, though in our caſe indeed the reverſioner is a proteſtant; beſides, it is very difficult to prove a foreign education, and a being ſent with intent, for the jeſuits, though they were caught in this caſe, will never be caught again; none but a man of Duke *Hamilton*'s application and intereſt could have brought them over; but now they know the conſequence, they will never be prevailed with to give the ſame teſtimony, and as this is the firſt caſe upon the ſtatute, ſo in all probability it will be the laſt.

Sir *Edward Northey contra.* I ſhall not need to go about to prove a title in the defendants upon this record, for their poſſeſ-ſion is ſufficient againſt the plaintiff, who muſt recover upon his own ſtrength.

The plaintiff relies on 1 *Jac.* only, but in my argument I ſhall pin them altogether, and admit them to be conſiſtent; for my Lord *Coke* ſays, where there are ſeveral ſtatutes relating to the ſame matter, one muſt not be ſingled out from the reſt, but the conſtruction muſt be uniform upon them all. The three ſtatutes now in queſtion were all made with the ſame view, and to prevent the ſame miſchief, and that was to be brought about by laying heavy puniſhments upon the offenders, and thereby obliging them to conform.

There

There are two sorts of offenders; those who send, and they who are sent, which latter we say forfeit only the profits of their estates, and that was taken to be the consequence of the statute at the time of making it, and therefore 3 *Jac.* does not introduce any new law when it speaks of the profits, but only directs the application of them to the next protestant of kin, which under 1 *Jac.* the King as *pater patriae* was intitled to.

The plaintiff does not make his case on 1 *Jac.* which respects only the intent, but has brought it within the words of 3 *Car.* for it is found they were actually educated, which is carrying the intent into execution.

I shall put every thing out of the case, but the operation of the statute as to descents. I would fain know, if this was an estate in fee descended, who should have it? The heir according to their maxim cannot, and shall it escheat to the Lord, as if the whole estate was spent? Can it be thought the legislature intended to favour the Lord or reversioner before the innocent issue? He must be prejudiced, unless it be construed, that the profits only are forfeited. The construction must be, that the ancestor shall take the legal estate, but he shall take no benefit by it: he shall not take for the advantage of himself, but for the benefit of his posterity he shall.

1 Will. Rep. 128. The statute 11 & 12 *W.* 3. has the words *be disabled to inherit or take*, but yet in the case of *Pye* v. *George* 1 *July* 1709. *in Canc.* it was held, that the subsequent words had controlled the former, so that they carried away no more than a *pernancy* of the profits, and the legal estate descended notwithstanding.

A man may take only for the benefit of another, as a person attainted, for the benefit of the crown. 1 *Inst.* 2, *b.* 2 *Roll. Abr.* 88.

I put all the rules of law out of the case, and come to the proviso for conformity: and I take it, that upon conformity the offender is to be in *statu quo*; and if so, how can the estate be revested? There is no provision for it in the statute, and that is an argument it was never intended the estate should go over. My Lord *Delaware*'s case, cited of the other side, is a case which has room enough to hold us both. It says that *Thomas* shall claim *from William*, and not *through him*. Now the word *from* implies he was seised, for otherwise *Thomas* could not claim from him. Here the estate-tail is not spent, and therefore the reversioner cannot be let in.

2 It

It is objected, that the freehold ſhall not be in abeyance. I anſwer, it is not; it is in the offender.

It is ſaid, *Philip* has no iſſue, and the reverſioner muſt not be obliged to wait upon that contingency. Anſwer: We muſt provide for what may be, as well as what is; the law never ſees any impoſſibility of having iſſue, and therefore upon a general intail there can be no tenant in tail *apres poſſibility*. Here is a poſſibility that *Philip* may have iſſue, and therefore the eſtate muſt continue to ſerve that poſſibility whenever it ariſes.

Another objection is, that if we have the eſtate, we may alien it. I anſwer: The ſtatute never intended to put the heir out of the power of the anceſtor, but only that he ſhould not be hurt by the diſability of the anceſtor.

We do not now rely on the recoveries, but ſet up the life of *Philip* againſt the plaintiff. I agree, if tenant in tail leaves iſſue an alien, the remainder-man may enter, for ſuch iſſue is as none.

If therefore the eſtate veſts, and the profits only are forfeited during the diſability, then the leſſor of the plaintiff can have no title.

Sir *Thomas Powys* replied. In Lord *Delaware*'s caſe it is ſaid the peerage never was *in William*, he was only an eſquire, and this deſtroys the inference from the word *from*. As to the caſe of *Woodward* v. *Fox*, it is a caſe *primae impreſſionis*, and a long while after this ſtatute, ſo that the law-makers could not know, the profits would go to the crown of courſe, it not being a point ſettled till that caſe. I know no body to whom the eſtate would have gone, had this been a deſcent in fee, but to the lord by eſcheat; and it is no new doctrine to diveſt eſtates eſcheated, as on birth of a poſthumous heir, or reverſal of an attainder. 3 *Inſt.* 231. And the ſame may be done on *Philip*'s conformity.

Curia adviſare vult. And *Trinity* 6 *Geo.* the court delivered their opinions *ſeriatim*, beginning with the puiſne Judge.

Mr. Juſtice *Forteſcue*. In delivering my opinion in this caſe, I ſhall make three points, which I deſign to ſpeak to diſtinctly. 1. What eſtate veſted in the ſecond *Charles*, who ſuffered the recovery, upon the ſtatute of 1 *Jac.* 1. *c.* 4. independent of the ſubſequent ſtatute. 2. What alteration was made in that law by the 3 *Car.* 1. *c.* 2. and how the conſtruction will be on both thoſe Reſolutio curiae.

thoſe ſtatutes taking them together. 3. What will be the effect of *Philip*'s life, who upon this record muſt be taken to be alive.

1. The reformation, which was begun in *Henry* the eighth's time, and compleated in the reign of Queen *Elizabeth*, had rendered it difficult for the papiſts to educate their youth at home as they deſigned, and therefore it was the advice of the pope at that time, to erect colleges abroad, that the *Engliſh* youth might be ſent thither. And purſuant to this advice, in the year 1598, there were two ſet up, one at *Rome* and the other at *Doway*, by which means many of our youth were drawn out of the kingdom, to the no ſmall prejudice thereof; and in order to put a ſtop to this miſchief, the ſtatute of 1 *Jac*: 1. *c*. 4. was made, which though it be a penal law, yet it ought to have a liberal conſtruction, becauſe it ſo much concerns the publick welfare of the kingdom: all laws are in ſome meaſure penal, but that is no reaſon to reſtrain them in ſuch caſes as this. 11 *Co*. 34. 70. *Hatt. of Stat.* 66. *Hob. Colt* v. *Glover*.

And upon this act I am of opinion, that a perſon who receives a foreign education in a popiſh ſeminary, has neither *jus in re* nor *ad rem*: he can take no eſtate at all, either real or perſonal; he is diſabled to inherit, purchaſe, take, have or enjoy: and can any words be ſtronger than theſe?

But it is ſaid the word *enjoy* implies a veſting of the eſtate, and that only a forfeiture of the profits was deſigned. Now if the word *enjoy* ſhould be ſo taken, I do not ſee how it could affect this caſe; for that could only relate to lands veſted before the offenſe (which is a caſe that ſeldom happens to infants, and therefore cannot be ſuppoſed to have been uppermoſt in the mind of the legiſlature) but as to lands that are to deſcend after the diſability, there are other words to take in that caſe, which are *inherit*, *purchaſe*, *take*. Beſides, 1. It is a very rare phraſe to expreſs a forfeiture by words of diſability only: in the ſtatute of 3 *Car*. there are words of forfeiture. 2. In a penal law it is too ſevere to conſtrue words of a preſent temporary diſability, into an abſolute forfeiture; but if they ſhould, they will only relate to goods and chattels. 3. And it is plainly a diſability in 1 *Jac*. If we do but compare the proviſo of that with the proviſo in 3 *Car*. which induces a forfeiture. In 1 *Jac*. he is diſabled to take, and therefore the proviſo for conformity reſtores him to a capacity of taking. In 3 *Car*. he forfeits; and there the proviſo reſtores him to the land, which ſhews the Parliament were aware of the difference between a diſability to take, and a forfeiture of the eſtate. 4. If only the profits ſhould be ſaid to be gone, what is that but the land itſelf. *Co. Litt.* 23. by a grant of the profits the land paſſes.

But

But it is objected, that he must take for the benefit of the ir, being only disabled in respect of himself, and not in re-ect of his heir. To this I answer: That these affirmative words ways imply a negative, and separate the case of the ancestor d heir: he himself in his own person shall not take, but his ir shall, *i. e.* this disability shall not be like an attainder, hich corrupts the blood, but it shall still flow pure from the cestor to the heir.

In these cases there is no need to leave any thing in the cestor, according to Lord *Delaware*'s case, which is express, at the dignity never vested in the grandfather, he was no aron, but only an esquire. And there the Lords and Judges ere of opinion, that the heir might claim by him, this being ly a personal temporary disability, which differed from an tainder.

Then the objection recurs, Are these words of no use at all? It often happens so, that to satisfy the scruples of the ignorant, words are added, which the more knowing part of mankind will plainly see were implied before: they are only explicatory of what went before, and serve to shew, that the heir in this case shall be enabled to make out his title through one who was never seised.

But say they, How can the heir take by descent according to the rules of law, if the ancestor was never seised? To this I nswer, 1. That at common law it is not necessary the an-cestor should be seised, to enable the heir to take by descent. *Shelley*'s case is, that where the ancestor *might* have taken the state and been seised, there the heir shall inherit. Nay in me cases the heir shall take by descent, although the ancestor ever was or could be seised of that estate, as in *Co. Litt.* 378. here lands were given to *A.* and *B.* for their joint lives, re-mainder to the right heirs of him that died first, *A.* dies, his eir shall take by descent: and yet the remainder never vested uring the life of *A.* it being uncertain all that time, whether he heir of *A.* or the heir of *B.* should have it. 2. Whatever it might be at common law will not avail in this case, which is an incapacity by act of Parliament; and therefore the com-mon law is a wrong *medium* to judge by. There could be no such desultory inheritance at common law as *The Prince*'s case, and yet it was there allowed, being by act of Parliament. And though these points are singularities, and contrary to the known ules of law, yet they being introduced by statute, must not be arried to the rules of law as to their standard.

And now let us consider a little the inconveniencies of a ntrary construction. It will be an encouragement to the papists.

papists to continue in that religion, when the punishment is not so great as what I contend for. It will be a discouragement to the heir or remainder-man from putting the act in execution, because he will then be cut off for his pains. It destroys the saving for the benefit of the heir, by putting it in the power of the ancestor to disinherit him. It is a repealing of the former part of the statute by implication only, which is never to be allowed; because it is a reflection on the wisdom of the legislature. 11 *Co.* 63. *Hob.* 15, 87. It is against all the rules of construction, to take them in the mildest sense, where Religion and the Publick are concerned. *Hob.* 344, 388. 11 *Co. Magdalen College* case.

The offender may deprive the King of the *pernancy* of the profits by his alienation. 21 *Hen.* 7. 12. *Raym.* 17. *Hardr.* 101. 5 *Mod.* and *Salk. Britton* v. *Cole.* In the other act of 3 *Jac.* 1. *c.* 5. the very profits are mentioned to be forfeited, of which there was no occasion here, when the land itself is gone.

It is objected that he may be convicted, and then 3 *Car.* carries all to the crown. But can he be convicted if he stays abroad? It is said it goes to the crown by implication, because this is a publick crime. For this there is no necessity in the case of a disability, as there is upon a forfeiture, which implies a having, and then it is to be carried away, whereas in the other he never has it at all. The person is the subject of one, and the land of the other. How can he forfeit what he has not? *Nil dat quod in se non habet.* Besides, a disability reaches what cannot be forfeited, and this difference between a disability and a forfeiture is kept up in many statutes.

2. The next thing to be considered is, whether any alteration is made in 1 *Jac.* by the statute of 3 *Car.* which, I take it, may very well stand with all the provisions of 1 *Jac.* and has not impaired the force of it in the least. 1. It enacts it to be put in due execution. 2. It reaches the offender more fully as to estates vested before the offense, about which the former statute was doubtful. 3. It lays the same penalty on the parent or guardian sending the youth abroad, who before forfeited 100 *l.* only. 4. It extends to private schools, whereas the other was confined to publick colleges. 5. It creates a disability to sue, be executor or administrator or committee of any ward; and after all these additions, are we to be told, it was only explanatory of the former law? Can a forfeiture be the measure of a disability? It is said to have so far enlarged and enforced the former law, as to shew how that must be put in execution, *viz.* by conviction. Now does it not say 1 *Jac.* *shall be* put in due execution? And does not that imply, that of itself it is sufficient, and *may be* put in execution?

The

The case of a fee-simple is put as a difficult case to know where the estate is to go. But are cases plain and express to be broke in upon, because difficult cases may be put? In the case of a purchase say they, if the bargainee cannot take, who can? But was it not expresly resolved in *Roper*'s case, that a bargain and sale would be absolutely void. There is no reason why a statute must be expounded away to nothing, because one or two difficult cases may be put upon it. The construction I lay down, and which in my opinion it ought to receive, puts the act in some use. The construction I have been arguing against leaves it no force at all.

3. The life of *Philip* is objected to be an impediment, which prevents the execution of the reversion in the lessor of the plaintiff, for say they, whilst he lives, the estate-tail continues. But I give the objection this answer: that *Philip* can take nothing, no more than *Charles* did. It is to this purpose the same thing, whether he be incapacitated or not *in esse*: the rule of law is, that where any limitation is to a person not *in esse* at the time the estate ought to vest, the estate must go over to the next in remainder. Here the limitation is to *Philip* and the heirs male of his body, but when the limitation ought to take effect, he is incapacitated to take, and then the remainder over to the lessor must take effect immediately. *Cro. Eliz.* 422. Devise to *R.* in tail, and after his decease without issue to *Edward* in tail; *R.* dies leaving issue, living the testator; and there it was held, that *Edward* should have the estate presently, and not wait till the death of *R.*'s issue. If a man has issue two sons, and the eldest be an alien, the law takes no notice of him, and therefore as he shall not take by descent himself, so he shall not impede the descent to his younger brother, on supposition that he may have issue a natural born subject. Indeed in the case of a person attainted, he shall obstruct the descent. 2 *Ven. Collingwood* v. *Pace*, but his heir cannot take, for that would be to let him in by act of law, and the law will not trust him with an estate. And in such cases, where the law will not suffer the estate to fall, it goes over to the next person capable of taking. 1 *Ven.* 417.

It is said the limitation to the issue of the body of *Thomas*, and *Philip* is such. It is true he is so in common parlance, but that is not enough; he must be issue inheritable, and for want of that here is a *cesser* of the estate-tail, on which the reversioner must enter. *Hob.* 346. *Dy.* 332. He is in the same case with the son of a daughter on a limitation to the heirs male of the body, for there the son is heir, and he is a male but not a male inheritable within the form of the gift, because he does not derive his descent through males. 1 *Inst.* 337. *a.*

It is objected that here is ſtill a poſſibility, that *Philip* may have iſſue inheritable. But this is but a poſſibility, and for a poſſibility it was never yet known that the freehold was allowed to continue in abeyance, for the law abhors abeyances, and will never ſuffer them, but in caſes of abſolute neceſſity. In all caſes where the heir is incapacitated to take, the anceſtor may juſtly be ſaid to die without heir. *Co. Lit.* 13. *a.* The leſſor might in this caſe lay it in a *formedon*, that *Thomas* is dead without any heir male of his body. 8 *Co.* 88. This is no more than the common caſe of a poſthumous heir, where the reverſioner enters till the birth, and then the tail revives.

It is ſaid *Philip* may conform, and to ſerve this poſſibility the eſtate muſt continue. Why may not an alien be naturalized, or a monk be deraigned? and yet was there ever any eſtate ſuſpended on that occaſion? If the King's tenant dies without heir, to prevent an abeyance the law caſts the freehold on the King without office: and to prevent the like miſchief it will carry the eſtate to the reverſioner in this caſe.

This caſe of a foreign education very much reſembles the caſe of a monk, for 1. The purchaſe of both is void. 2. Neither can inherit. 3. The heir of neither is diſabled. And 4. The diſability is but temporary in both caſes. And it is no anſwer to ſay that a monk is looked on in law to be civilly dead, for that is only a ſimilitudinary expreſſion, and as he loſes no civil rights, but is conſidered in many reſpects as a member of the community, ſo he is anſwerable for any offenſes by him committed after his civil death. *Bro. Moin.* 23, 25. Our offender is more civilly dead than a monk; for the latter may be executor, but the former cannot. An outlaw, one under a *praemunire*, or abjuration, are as much civilly dead as he: and why is not this temporary diſability like the caſe of a parſon who married and was formerly on that account incapable to hold his living: or like the caſe in 2 *Rol. Abr.* 415. *C.* 6. of a deviſe to a monk for life, remainder over to *B.* who was allowed to take immediately: and ſuppoſe that been a deviſe in tail, ſhould the iſſue of the monk have taken? certainly he ſhould not.

Another difficulty laid in the way is the proviſo for conformity, becauſe ſay they we cannot eaſily get back the eſtate again. But is not the objection as ſtrong upon their conſtruction in bringing back the eſtate from the crown? Is it eaſier to recover againſt the crown than a ſubject? Beſides it is far from being clear to me, that this proviſo does reſtore him to his eſtate; there are no ſuch words in it, but only that he ſhall be reſtored

to

to his capacity, that is, he ſhall for the future be capable of taking any eſtate that may come to him. If the meaning of that proviſo was to reſtore him to all; I can ſee no difficulty, but that he may as eaſily bring back the ſtate again, as in the caſe of a poſthumous heir, or a monk deraigned. 3 *Inſt.* 231. *Fitzh. Mord.* 46. *F. N. B.* 195. *Dy.* 13. The Lord by eſcheat takes but *in loco haeredis*, as the reverſioner here does in the room of *Philip.* 9 *H.* 6. 23. *b.* 2 *Roll. Abr.* 418. His incapacity ſhall no more keep back the eſtate from the reverſioner, than in the caſe of a deviſe for life or in tail, to one who refuſes, remainder over, it ſhall veſt immediately.

Upon the whole therefore I am of opinion, that in this caſe the ſtatute of 1 *Jac.* is the meaſure by which we are to conſtrue this diſability, and that under this ſtatute no eſtate ever veſted in *Charles*; by which he having no poſſeſſion, the recovery is void; and that the life of *Philip* will not ſtand in the way of the Ducheſs: as a conſequence of all which the judgment given below for the defendants is erroneous, and ought to be reverſed, and that this court ought to give a new judgment for the plaintiff.

Mr. J. *Eyre.* I muſt own I have the misfortune to differ from my brother, for I think the judgment given below for the defendants was well given, and ought to be affirmed; though I muſt ſay thus much, that I do not approve of the reaſons given by the court of *C. B.* for that judgment.

The general queſtion in this caſe is, whether a foreign education in a popiſh ſeminary infers an abſolute diſability to take any eſtate, for unleſs it does the leſſor can have no title.

There have been three ſtatutes mentioned in the debate of this caſe; the 1 *Jac.* 1. *c.* 4. 3 *Jac.* 1. *c.* 5. and 3 *Car.* 1. *c.* 2. Of theſe I think 3 *Jac.* is nothing to the purpoſe, but that of 3 *Car.* is of weight; not that I eſteem it a repeal of 1 *Jac.* but I look on it as explanatory of it, and without which the former ſtatute cannot be put in execution.

Now upon the ſtatute of 1 *Jac.* (taking the firſt and laſt part together, as we muſt do to make a reaſonable conſtruction) I am of opinion that the party ſo educated has notwithſtanding a capacity to inherit and take, for particular purpoſes, and that the ſtatute does not induce an abſolute diſability, and that the conſtruction will be the ſame in the caſe of a fee-ſimple as of a fee-tail. I do not ſay he is to be maſter of the eſtate, but thus much he muſt have, a power to tranſmit the inheritance to the heir. This is as to the caſe of a deſcent. In the caſe of a purchaſe too I think he has a qualified capacity,

 for

for he may purchase for the benefit of the heir, as one attainted does for the benefit of the crown; and in both cases, that of a descent, and that of a purchase, the estate will vest, and the profits only be forfeited during the disability.

And it is no objection to say, that the statute is silent as to the profits where they are to go, for I take it such a provision was not necessary, since, this being a publick offence, they will of course enure to the benefit of the crown.

Roper's case is of no consequence, for that was upon the 11 & 12 *W.* 3. *c.* 4. which is penned in a different manner from our statute: neither is Lord *Delaware*'s case at all to the purpose, for there the disability was absolute for life.

But here it is objected that the offender for and in respect of himself is absolutely disabled, so that he was to be punished as much as possible, only the heir was not to be involved in the guilt. To which I answer, That the true end of the statute was, not to punish the persons of those who received this foreign education, but it was to prevent the influence they would otherwise have, if the estate should be continued for their benefit. And it is no objection to say, that the offender may defeat the crown of the profits by his alienation, for is not this the same with many other cases of forfeitures? and what reason is there to take more care of the crown in this case than any other? or what greater danger is there in having a capacity to take a future estate, than in being allowed to hold a present one, which I do not perceive it is contended will be absolutely taken from him by this statute. The heir it is true cannot enter living the ancestor. But this rather proves the necessity of leaving something in the ancestor, till the heir is capable of taking. And surely, if it had been designed that the estate should go over, it would have been so mentioned, as is done in 6 *R.* 2. about ravishers of women, where there are express words to carry over the estate. But no case can be shewn, where without express words any estate was carried over from a person who has a possibility of being inheritable. The case of a monk is widely different, for that was always looked on as an absolute death to these purposes, and a deraignment was never so much as looked for or expected.

Upon the whole my opinion is, that *Charles* had a sufficient possession and power to suffer a recovery, and this makes an end of the plaintiff's title, be that matter about the life of *Philip* which way it will; though, if it were necessary to give my opinion

y opinion upon that, I ſhould think the eſtate could not go ver, but muſt continue for the benefit of him and his iſſue.

Mr. J. *Powys*. In a caſe of ſo uncommon a nature as this, nd of ſuch great difficulty, I think there is no occaſion to nake any apology for a difference in opinion from any of my rothers.

I ſhall make four points in this caſe: 1. Whether under *Jac.* any, and what eſtate veſted in *Charles* or *Philip*. . What alteration has been made by the ſubſequent ſtatute. . What is the effect of the recoveries. And 4. Of *Philip*'s life.

1. Then, to diſcharge this caſe of that which was the ground f the judgment in *C. B.* I can ſee no colour in the leaſt to hink, that 1 *Jac.* is any way repealed by the ſubſequent ſtautes. The intent of it, it is true, was to prevent the growth f popery, and in this reſpect it is a law made for the benefit f the publick; and though a foreign popiſh education is not o be favoured amongſt proteſtants, yet I can never give into ny forced conſtruction, which is to carry the words to the utoſt ſeverity of the law.

The diſabling clauſe in this ſtatute is different from the 11 12 *W.* 3. which is abſolute, but this *ſub modo* only, in reect of himſelf, and not in reſpect of his heir, and therefore e muſt certainly have ſomething: how elſe can he purchaſe reſpect of his heir? I agree my brother *Forteſcue*'s difference etween a diſability and a forfeiture thus far, where the diſbility is abſolute, but not where it is only partial, as in this aſe, which likewiſe diſtinguiſhes it from Lord *Delaware*'s caſe, r that was a total diſability for his life.

I think that upon conformity he will not only be diſcharged f the diſability, but likewiſe be reſtored to his eſtate, for the nd of the ſtatute is anſwered, when it has been a means to raw him from the popiſh religion.

I do not ſay he is to have any benefit of the eſtate during the iſability: no, the profits ſhall be forfeited, but only to ſupport he eſtate for the heir, he ſhall be taken to have the legal title him, and I can ſee no difference where the diſability is at ommon law, and where it is created by act of Parliament. What a confuſion would it otherwiſe create in the caſe of a e-ſimple, or a purchaſe? In the caſe of a fee-ſimple is there y colour to ſay the Lord by eſcheat ſhall have it? he can im only, when the tenant dies without heir; but here both tenant and his heir are alive, and to prevent the entry of Lord the ſtatute takes care of the heir. It cannot be preided, that a diſabled perſon who may remove that incapa-

efty whenever he pleafes, is a perfon dead without heir. I need not urge the inconvenience in vefting and revefting eftates, which was never favoured as yet.

It is objected that the laying this inconvenience in the way, is begging the queftion; for fay they, here will be no revefting, fince the conformity will not reftore him to the land. But does not the ftatute 3 *Car.* fay exprefsly, he fhall be reftored to the land? And is not this to be taken as a declaration of what was not fufficiently expreffed in the former law? Is not their conformity for the benefit of the publick? and is it not fitting, they fhould have fome encouragement to conform? It is faid they will have a future capacity to take any new eftate that may come, but that is a rare cafe for children to meet with any befides their paternal eftate.

The cafe of a monk, fo much relied on as a fimilar cafe, is nothing to the purpofe; for he is dead in law, and has an heir; but our offender can have none whilft he lives. And there too the heir claims under the feifin of the monk, which the heir in our cafe upon the plaintiff's conftruction cannot, for they fay the anceftor had no feifin at all. Neither is the cafe of an infant *en ventre fa mere* at all applicable to this cafe, for there the perfon who enters till the birth is undoubtedly heir, and claims as fuch from him that laft died feifed, but here there is no fuch intermediate time as between the death of the father and the birth of the child, for the party who is to take is alive all the while, and *in effe* at the inftant of the defcent.

There is no danger of the freehold's being in abeyance, becaufe as I take it the legal eftate vefts in the offender. I would put the cafe that a man has two fons by two venters, the eldeft of which receives a foreign education, and furvives the father and dies, muft the brother of the half blood inherit to him? The law fays no: but yet upon the plaintiff's conftruction he muft, if the eldeft fon never had any thing, for then the other will claim immediately from the father.

There are many inftances where abfolute words in a ftatute have received a qualified conftruction. The ftatute of *Weftm.* 2. fays the fine *ipfo jure fit nullus*, and yet 2 *Inft.* 336. it is held to be a difcontinuance, for which before the 11 *H.* 7. the party was put to his *formedon*.

But when the argument that the profits only are forfeited prevails, there arifes a fub-point, who fhall have the profits? I fay the King fhall have them. 1. Becaufe he is concerned to

ſee the law executed. 2. There are goods in the caſe as well as lands, and who can have them but the King? 3. This is an offenſe of a public nature, *contra coronam et dignitatem ſuas*, and that makes the difference between the caſe of *Woodward* v. *Fox*, and the caſe of tithes, where a private intereſt is concerned. 4. Thoſe will be like derelict lands which go to the crown when there can be no owner found.

2. I come in the ſecond place to conſider what alterations are made in 1 *Jac.* by the ſtatute of 3 *Car.*

One great end and view of this ſtatute is ſaid to be, to reach eſtates veſted before the offenſe, but there can be nothing in that, the former ſtatute taking in both caſes, for the words *have* and *enjoy* go to eſtates veſted, and it is abſurd to think the Parliament would truſt them with a preſent eſtate, who were unfit to take a future one, which is ſuffering them to fight in armour. The true and main deſign of this latter ſtatute was to lay a heavier puniſhment on the parent or guardian ſending the youth abroad.

The ſtatute 3 *Geo.* protects proteſtant purchaſers of popiſh eſtates, and without doubt if *Charles* had ſold his eſtate the purchaſer would have been ſecure againſt that ſtatute.

3. The effect of the common recoveries need not now be conſidered, becauſe having the eſtate in him, as I hold he had, that is ſufficient to exclude the reverſioner.

4. *Philip*, who claims before the Ducheſs, is ſtill alive and keeps up the eſtate-tail; ſo the reverſioner is too ſoon: he is iſſue in tail, and a *formedon* muſt lay that there is none. In the caſe of *Pye* v. *Gorge*, 1 *July* 1709. before Lord *Cowper*, on the 11 & 12 *W.* 3. *c.* 4. which has the ſame diſabling words, it was held that notwithſtanding a default in not taking the oaths, yet the eſtate would veſt in the party.

I think upon the whole, the leſſor of the plaintiff has no title, and conſequently the judgment of *C. B.* ought to be affirmed.

Lord Chief Juſtice *Pratt*. This caſe depends upon the conſtruction of the ſtatute of 1 *Jac.* 1. *c.* 4. And as the offenſe ſtrikes both at our Civil and Religious eſtabliſhment, this is in every reſpect *cauſa religionis et reipublicae*; and being ſo, if it be capable of two conſtructions, we ought to put that upon it, which will tend the moſt effectually to prevent the miſchief.

It is notorious that the reformation, which was begun in *Henry* the eighth's time, was, by the unwearied diligence of the priests and jesuits, very much broke in upon and interrupted, so that it cannot be said to have been compleat till the reign of Queen *Elizabeth*, who had many and great struggles with the papists. The first attempt to restrain them within due bounds was by very gentle and easy methods, but it was soon found that these signified nothing; private meetings were had all over the kingdom, to instruct and confirm people in the principles of their religion; and therefore it was found necessary, by a severer law, to make it high treason for any one to reconcile another to the see of *Rome*: but even a little experience of this law shewed it to be an unequal remedy, and therefore the next step was to banish the priests, and now every body hoped the work was done.

But the priests, though by this law they were many of them obliged to leave the kingdom, were nevertheless still as active, in finding out means to ruin the protestant religion; and for that purpose erected seminaries abroad for the education of the *English* youth; and to put a stop to this mischief, the statute we are now upon was made, which if we do not construe it in a large sense, will dwindle into no remedy, and then all is at sea again.

The clause on which the question arises is this, speaking of a foreign education, it enacts, "That every such person so "passing or being sent beyond the seas to any such intent, "shall, as in respect of him or herself only, and not to or in "respect of any of his heirs or posterity, be disabled and "made incapable to inherit, purchase, take, have or enjoy any "manors, *&c.*"

Now on the plaintiff's side they say, the statute induces an absolute disability to take the estate. The defendants say the estate vests, and nothing is forfeited but the perception of profits. The different consequences of these constructions are obvious. The first overthrows the recovery, and the life of *Philip*, and bears down all before it. The other opposes both to the plaintiff's title, and vindicates the method of cutting off the reversion.

And upon this clause I am of opinion, that the latter construction is not proper, nor will at all answer the end of the statute.

1. It is against the words, by making him capable, who the act says shall be disabled.

2. By

2. By this all the significant words of the statute are rejected, or there will be no need of the words *inherit*, *purchase*, *take*, because the word *enjoy* alone will do the business of the profits: and it is inconsistent with the honour and wisdom of the legislature to make use of such known legal expressions, when at the same time they are to have no influence in the construction of the statute.

3. When the profits only are designed to be forfeited, the Parliament speak out, as in the 3 *Jac.* 1. *c.* 5. in relation to offenders against that law: and there likewise they take care to dispose of the profits during the disability, which provisions are not in our law; and therefore it is not to be imagined, that the same thing was intended in both. And surely, if at the time of making the act of 3 *Jac.* it had been designed to punish the offender against 1 *Jac.* in the same manner, there would have been some declaration or other to that purpose.

4. The forfeiture of the profits is idle, and comes to nothing; for if the estate vests, the party may alien, suffer a recovery, give it away, or settle it in other hands secretly for his own benefit, and then the provision of the statute will be ineffectual. And how can it be imagined, the Parliament would apply so loose a remedy to a growing mischief they were so much alarmed at?

It is objected, that this is a qualified disability. As to that, I think it was truly said, that the latter words import a negative, it is but *expressio eorum quae tacite insunt*; the import of which is only, that whatever difficulty could regularly arise to the heir from the ancestor's not being seised, that shall be no objection, to the heir, who shall be able to make out his title through one that was never seised.

Consider the method of debating in Parliament. Somebody might object, that possibly it would be taken to the prejudice of the heir, by saying the ancestor should be disabled; to which it might be answered, that though it was not necessary to declare the contrary, yet for the satisfaction of ignorant men there could be no harm in putting in something to that purpose.

Lord *Delaware*'s case is strong in point, for if that absolute disability would not prevent the descent, there is no colour to say this qualified disability shall.

But say they, if he himself is absolutely disabled to purchase, what will become of the heir? As to that, I think the Parliament

ment designed he should not purchase at all, for it follows after, that all estates, terms, &c. for the benefit of such a person shall be void: and are not these to be taken into the construction of the statute? Shall we reject all this, and say it signifies nothing?

Well, but here is a disability to take personal estate as well as real, and what has the heir to do with that? why nothing at all, and those words were only thrown in *ex abundanti*, for a disability to take personal estate as to himself, is as strong as to take it likewise against the heir.

The heir will not be hurt in this case, because according to *Shelley*'s case it is sufficient if the ancestor *might* have been seised.

And as to the objection about the difficulty of being restored on conformity, I think there is none at all; because I hold, that he is not to be restored. The statute does not say so, and therefore I do not see how we are warranted to give him his estate again. No one will conform till he suffers, nor then neither unless he sees he is like to suffer further. But cannot the Parliament restore him by sufficient words? Surely they have power to vary the law, according to the *Prince*'s case, which reduces this part of the case to this dilemma. Either he was or was not designed to be restored. If he was, it may easily be done by force of the statute: if he was not, then the objection of difficulty in doing it is vanished.

It is objected that the remainder-man cannot enter, living *Philip*, who is issue in tail. But I take it, a disabled person is to be looked on as not *in esse*; the current of authorities is so, and none to the contrary, but that if the party cannot take, the estate must go over. If the eldest son dies leaving his wife *privement enseint* with a son, the second son enters, but on the birth of the other the estate is brought back: and so does the remainder-man or reversioner where the issue in tail is not born at the death of the tenant in tail. In the case of a fee-simple it shall escheat, and be divested out of the Lord on the birth of a posthumous heir. If it was the case of a purchase it would go over, and could never be brought back, as on a limitation to the heir of a person living at the determination of the particular estate, for he who takes by purchase must be *in esse* at the time the estate ought to vest. But it is otherwise in the case of a descent, for there he does not claim any new estate, but the old one, which his ancestor enjoyed before him.

Suppose a man has two sons, the eldest an alien, and the other a denizen; in that case the estate shall go to the youngest, because the other is disabled, and so is the case of *Collingwood* v. *Pace*.

In

in the case of an attainder it shall escheat for the disability. Co. Litt. 13. And in the case of profession it goes over as on a natural death. 2 Roll. Abr. 150, 415. And the true reason of carrying over the estate in all these cases is, to prevent the freehold's being in abeyance, which is a reason why in the present case the reversioner must enter, else there can be no good tenant to the *praecipe*, which the law requires of every estate.

It is said that the law suffers abeyances in some cases, as in that of a parson, or where houses or lands are annexed to offices; but are not those cases of absolute necessity?

I can see no reason why in this case the estate cannot be brought back as easily as in the instances I have before put.

My brother *Fortescue* has so fully pressed that matter about the statute of 1 *Jac.* being in force, and unimpeached by 3 *Car.* that I shall not need to go over it again: nor do I find my brothers who are of a contrary opinion rely much upon that.

To conclude therefore, I am of opinion, that under 1 *Jac.* the offender takes nothing; which construction obviates the recovery, and the life of *Philip*, and removes every thing that stands in the way of the Dutchess: and the judgment below being against her, I conceive it is erroneous, and ought to be reversed.

But the court being divided, you are now to consider what is further to be done in this cause.

Whereupon the counsel for the defendant in error proposed that it might be adjourned into the Exchequer Chamber for the opinion of all the Judges; which was opposed by the counsel for the plaintiff, who said that there were no instances where upon a division in that court, to which the cause was adjourned by writ of error, there have been ever any adjournments into the Exchequer Chamber: and the reason of that, they said, was that it would be absurd to ask the Judges of *C. B.* whether they would advise this court to reverse a judgment given by themselves.

What is to be done where the court are equally divided upon a writ of error.

Then the counsel for the plaintiff, Mr. Solicitor General, Mr. *Reeve* and Mr. *Strange*, being asked what method they desired it to be put into; they said, that as the defendants were in possession of a judgment of another court, they could not contend, that upon a division of this court, the judgment of *C. B.* ought to be reversed. But what they insisted upon was, that this

N. B. This was my own argument, the other counsel not being prepared.

this cause might be adjourned into Parliament, that their Lordships might receive the direction of that great court, what judgment should be entered in this cause.

That causes of a civil and criminal nature have been originally commenced in Parliament, they said was a fact too notorious to be denied; and therefore they forbore troubling the court with any instances of that nature, but would proceed to shew, that as the Parliament had taken conusance of causes in the first instance, so they had been applied to for their direction: nay they had interposed of their own accord in cases where inferior courts had been divided, or thought the point too difficult for their determination.

Their first citation was a *dictum* of my Lord *Nottingham's* in the Duke of *Norfolk's* case, where he intimates, that there may be an adjournment *propter difficultatem* out of a court of law into Parliament.

Bract. lib. 1. *c.* 2. speaking of the stability of the *English* laws, that they are not to be altered but by Parliament, has these words: "*Si autem aliqua nova et inconsueta emerserint, et quae* "*prius usitata non fuerint in regno, si tamen similia evenerint, per* "*simile judicentur, cum bona sit occasio a similibus procedere ad* "*similia. Si autem talia nunquam prius evenerint, et obscurum et* "*difficile sit eorum judicium, tunc ponantur judicia in respectum* "*usque ad magnam curiam, ubi ibi per consensum curiae terminentur.*

Regist. 124. *b.* there is a writ in these words: "*Quia volumus* "*quod querela pendens inter te* (one of the parties to whom it is "directed) *et* C. *et alios de quadam transgressione coram nobis et* "*concilio nostro apud Westmonasterium discutiatur et terminetur,* "*tibi precipimus quod sis coram nobis et concilio nostro apud Westmonasterium ad quindenam sancti Michaelis* (*quem diem praefato* C. "*dedimus*) *tunc ibidem ad informandum nos et concilium nostrum* "*super negotio praedicto, et ad faciendum et recipiendum quod per* "*nos et concilium nostrum praedictum super dicto negotio considerari* "*contigerit.*"

1 *E.* 3. 7. *a.* after stating the case, and what had been said upon it, the book goes on: *Et puis vient breve quod si difficultas aliqua intersit, le record soit maund en parlement, et adjurner les parties la* xv. *Pas. et dit fuit al Vicount que il ust les deniers a meme le jour. Cotton's Records* 30.

My Lord *Coke* in 4 *Inst.* 68. takes notice, that at common law before the 14 *E.* 3. delays of judgment were provided against in five manners, and one of the instances he is pleased to give it, by

ıe King's writ, comprehending, *quod si difficultas aliqua in-*', the record should be certified into Parliament, and to ad-n the parties to be there at a certain day. *Si obscurum et ile sit judicium, ponantur judicia in respectum usque magnam am.* And of this, says he, there was an excellent record he Parliament holden at *Westminster* the *Tuesday* after the slation of *Thomas a Becket.*

The last citation was the case of *Nevil* v. *Stroud* in 2 *Sid.* l. which begins with telling us, that the case had been n argued in *C. B.* and by them delivered into Parliament, o took order therein. Which they relied on as a stronger e than the present, for that being in *C. B.* where the cause ginally commenced, it was a case within the same measure h all other Exchequer Chamber cases.

But if the court was not inclined to proceed in that extra-inary manner, then they said, that rather than undergo the ay and expence of an argument in the Exchequer Cham-, they were content to go up to the House of Peers under disadvantage of the judgment's being affirmed in this court. d if there was any difficulty with the court as to affirming a gment upon a division, where the party consents, they put it n the other side to shew the expediency of such a method.

Then the counsel for the defendants being called upon, they lared, that they did not desire to have the judgment af-ned. Which obliged the plaintiff's counsel to go and argue an affirmance.

They said, they had inquired into the practice of the Ex-quer Chamber erected by the statute of *Eliz.* for correct-the judgments of this court, where upon a division of four l four the judgment is affirmed, as was done in the great e of *Deighton* v. *Greenvil.*

They likewise relied on it as an argument for affirmance, it there were no instances of adjournments into the Exche-er Chamber upon a writ of error, which in a great measure ves the practice of affirming a judgment upon a division; ce there is as much likelihood of a division upon a writ of or, as in any other case, where causes have been so ad-rned.

So is the practice of the House of Lords: and though that y be said to depend on their practice of putting the question y to reverse; yet that shews the sense of that house, that hout a majority for reversing, the judgment ought to be rmed.

Many

Many judgments they said had been affirmed, even when the whole court must have been of opinion, that the judgment was erroneous: it is a rule that the party shall not assign for error any matter that is for his advantage, as too long an essoin, or the granting aid where it ought not, and yet that is error in the proceedings. 7 *H.* 6. 21. *a.* And the court must see and adjudge it to be so, but yet because they are not told of it by a proper person, the judgment shall be affirmed; and what is that but to affirm an erroneous judgment? And many instances of this nature are put in 5 *Co.* 39. *b.* and 8 *Co.* *Beecher's* case.

If the defendant in error pleads a release; and it is found with him: this is a confession of the errors, but yet in *Aston's* *Ent.* 339. the entry is, that the judgment be affirmed.

Ante 68. In the case of *Jones* v. *White* on a trial at bar, *Mich.* 4 *Geo.* *B. R.* the question was, whether the coroner's inquest could be read, in a suit between party and party; the present Lord Chancellor and Mr. J. *Powys* were of opinion it might, *Eyre* and *Pratt* Justices were of a contrary opinion; but *Pratt* J. after delivering his opinion, did so far retract, as to consent it should be read in that case. And in the case of the common council-men of *London*, the present Chancellor did consent to discharge a rule, that the parties might not be hung up for ever, and there too was an equal division of the court.

But if the party was not intitled to demand an affirmance in this case, yet they said it might be done upon their consent, *consensus tollit errorem*, and no injury was done them, if they were willing it should be so.

Upon the whole therefore they submitted it to the court, that this was not a proper case for the Exchequer Chamber, that it might go by adjournment into Parliament. Or if that method was thought impracticable, then they were willing to make this case an exception out of the general rule, *quod judicium redditur in invitum*, by their consent that the judgment given below should be affirmed.

Whereupon the court took time to consider of it, and in *Michaelmas* term following *Pratt* C. J. delivered the resolution of the court.

It was our misfortune the last term to differ in opinion, and I find we continue still under that difficulty; so that now we are

e to confider, what is to be done upon this divifion, for the ufe muft not be hung up for ever.

By the ftatute 14 *E.* 3. it is provided, that whereas caufes re been delayed for difficulty and divifion in opinions, theree to remedy the delays occafioned thereby, there fhall in ry Parliament be chofen a prelate, two earls and two barons, o by good advice of others, are to give judgment; or if y cannot determine it, that then the record fhall be brought o Parliament, who fhall make a final accord, and the Judges ore whom the caufe is depending, fhall proceed to give gment purfuant to their directions.

But we can find no footfteps for hundreds of years of any h appointment of a prelate, two earls, and two barons. that it is to no purpofe to think of putting the parties into t method. But into fome method we muft put them, that re be not a defect of juftice.

Now in the firft place we are all of opinion, that it is imper to adjourn this caufe into the Exchequer Chamber. We re caufed ftrict fearch to be made, and can find no inftances adjournments upon writs of error; nor can there be any cor for fuch a practice, it being abfurd for us to afk the inions of Judges who have before given judgment in the ufe.

We are afked in the place to adjourn this caufe into Parment. As to this we are all of opinion, that we have no wer fo to do. It would be the higheft prefumption in us, our own accord to attempt it, without the King's writ. fuch an one had been brought us, we might perhaps have gone to fuch an expedient, but the parties have not thought fit purchafe fuch an one.

N. B. We who were counfel for the Duchefs, did not think it advifable to get fuch a writ: becaufe all that the Lords could e done upon it would be, to direct the King's Bench what judgment to enter, after which a writ error would lie in Parliament in the common form: fo we chofe rather to have the judgment afted upon us, that we might have it determined at once in the Houfe of Lords. Lill. Ent. 524.

But then the plaintiffs in error move us for an affirmance: to that you fee the court is divided, and there can be no rule: t in this cafe, becaufe the party againft whom it is to be irmed, is defirous and willing it fhould be fo, we are all of inion that upon his confent the judgment of the Common eas may be affirmed.

But left this be brought in future ages as a precedent of an rmance upon a divifion, we direct the officer to make the

rule

rule special in this case, on recital of the difference in opinion amongst the Judges, and the consent of the party.

Whereupon I moved on behalf of the Duchess, that in regard this was not an affirmance upon the merits, the court would give some directions as to the costs. But they refused to do any thing in that, and said, it must take the common course of an affirmance. But the defendants in error were afraid to take any costs, whereupon the judgment of affirmance was entered up in common form but without costs. And upon a consultation we were all of opinion, that it should not be a special entry according to the rule, because then we should lie open to an objection in the House of Lords, that we were striving to reverse a judgment, which by the record appeared to have been affirmed by our consent.

N. B. This case was thrice argued at the bar, in the court of *Common Pleas*, 1. in *Trinity* term, 11 *Ann.* by serjeant *Hooper*, for the plaintiff, and serjeant *Pengelly*, for the defendants. 2. In *Michaelmas* term following, by serjeant *Pratt*, for the plaintiff, and serjeant *Selby*, for the defendants, and 3. In *Hilary* term following, by Sir *Thomas Powys* for the plaintiff, and serjeant *Cheshyre*, for the defendants. The arguments of serjeant *Hooper* and serjeant *Pratt* for the plaintiff, and of serjeant *Pengelly* and serjeant *Selby* for the defendants, were never published till the second edition of 11 Modern, in the supplement to which, the substance of them may be read, in p. 355. The last argument of this case in the course of *Common Pleas*, by Sir *Thomas Powys* for the plaintiff, and serjeant *Cheshyre* for the defendants, is in 10 Mod. 113. Suffice it to say, that, upon these several arguments, the court of *Common Pleas* were unanimous in opinion for the defendants, and gave judgment accordingly; upon this judgment a writ of error was brought into the court of *King's Bench*, where the judges were divided in opinion; and from thence it was adjourned to the House of Lords who affirmed the judgment of the court of *Common Pleas*. The opinion of the court of *Common Pleas*, and the subsequent arguments, with the opinions of the judges, in the court of *King's Bench*, are those reported above. See also 10 Mod. 356, 406. And for the proceedings in the House of Lords, see 2 Brownl. Parl. Cas. 203. See 11 Mod. 377.

Afterwards, the 23d, 24th, and 25th of *February* 1720, this cause was heard in the House of Lords, where all the Judges were ordered to attend, and give their opinions: the Chief Justice and *Fortescue* were for reversing, and the other ten, who would not say that the recoveries were good, were nevertheless of opinion, that the Duchess could not enter during the life of *Philip*. And the house thinking that to be a material objection, affirmed the judgments given in the courts below. *Quære tamen*, for that seems to be the weakest point in the cause; and how it is possible to distinguish between the recoveries and the life of *Philip* I cannot conceive, for if *Philip* may take, then must *Charles* have the same capacity of taking; and on the other hand, if *Charles* could not take, so as to enable him to suffer the recoveries, then the same objection will go to *Philip* also.

Anonymous in C. B.

Feigning bail, cause for the pillory.

TWO people put in bail in feigned names, and because there were no such persons, they could not be prosecuted for personating bail on the statute 21 *Jac.* 1. *c.* 26. So the court ordered them and the attorney to be set in the pillory, which was done accordingly.

Dominus

Dominus Rex *versus* Major' et Alderman' Civit' Carliol.

UPON return to a *mandamus* to restore one *Poulter* to the office of capital citizen of *Carlisle*, the case was thus:

Where particular powers are lodged in a select number, they cannot separate and act upon a general summons of the whole body, but there ought to be a particular summons for that purpose.

he corporation consists of a mayor, aldermen, bailiffs, and al citizens, who together make a common council, and the power of election of capital citizens: the power of ion is in the mayor and aldermen only, or the major part of : then the return sets forth, that such a day the common cil was assembled, and *Poulter* being summoned did not ap- and thereupon the *mayor and aldermen sic ut praefertur assem-* made an order for his amotion (for a cause allowed to be .)

akerly. There ought according to *Bag*'s case, 11 *Co.* 99. to summons to appear at such an assembly as has the power of ion, which is wanting in this case. The summons was not eet and execute the power as mayor and aldermen, but to with others in execution of other powers, which they had common council: and when they meet in that capacity, are to be considered as distinct persons from those who up- ther occasions meet as the court of mayor and aldermen They cannot, when they come together upon a sum- to meet only as a common council, divide, and execute powers. Such clandestine proceedings are never to be al- l, for at this rate any man may be tricked out of his free- When an alderman is summoned to the common council, y think there are only acts of course to be done, and so ab- himself; when he would not have failed being there, had prehended an act of so great consequence was to be done as epriving a man of his freehold: nay by this means a few so contrive it, as to fall upon this business at a time when find others who would oppose such arbitrary proceedings e out of the way. There ought to have been notice of a l meeting, in order to do this act. *Dav.* 48. *a.* 3 *Bulst.* 1 *Roll. Rep.* 409.

ttle contra. There could be no special summons for this se; because till the assembly was met, it could not be n whether *Poulter* would appear or not. As to the case in that did not appear to be a corporate assembly; and *Holt* Justice said of it, that it might only be a meeting in their l capacity, to feast or the like. But this appears to be a rate assembly: they are assembled in common council.

And when they were together, why might they not execute the power they had, without the formal diſſolution of that aſſembly and calling a new one?

Chief Juſtice. The powers of the common council, and of the mayor and aldermen, are diſtinct: the common council can do no acts, unleſs aſſembled in that capacity: neither can the mayor and aldermen, unleſs they met only as ſuch, upon a regular ſummons for that purpoſe: as they had diſtinct authorities, they muſt be ſummoned in their diſtinct capacities: here was no ſummons to meet as mayor and aldermen only, the conſequence of which is, that the acts done by them in that diſtinct capacity are void. Conſider how the caſe ſtands; an alderman when he receives a ſummons to appear at the common council, conſiders with himſelf, that they are a great many of them, and probably his ſingle voice will not be wanted, and therefore he ſtays at home: but when he is ſummoned to meet with the mayor and other aldermen only, then, ſays he, there are but twelve of us in all, and therefore my voice and advice (which the others have a right to) may go a great way: beſides, the powers lodged in us as a court of mayor and aldermen are of an higher nature than our other powers; and therefore upon both accounts my preſence may be neceſſary, and I will be ſure to be there. All this is natural enough, and is it then reaſonable the others ſhould proceed to act as mayor and aldermen only, when they come together in common council? What a confuſion would this make in the city of *London*, if, when the whole body is got together, they ſhould all of a ſudden draw off into different parties, and execute their diſtinct powers? It weighs nothing with me, that the cauſe of removal happened ſitting that aſſembly, for they ought to have broke up, and ſummoned him again to appear before them in their diſtinct capacity.

Powys Juſtice *accord.* as to the main, but doubted, becauſe the offenſe aroſe ſitting that aſſembly.

Eyre Juſtice. The ſummons ought to have been of ſuch an aſſembly only as has power to remove, elſe it may be liable to the inconvenience of ſurprize: not that a ſummons to meet and do any particular act is neceſſary, for that would be endleſs, but only to meet in their diſtinct capacity. Incidental powers are in the whole body only, but yet conſtant experience (and ſo is *Bagg*'s caſe) tells us, that if any ſelect power (which if not affirmatively given would be incident of courſe) is veſted in a ſelect number; that is excluſive of the other part of the corporation. A power of making by-laws is incident to every corporation, but yet in many they are made by a ſelect number.

Forteſcue

rtescue Justice. Being summoned to appear at the common :il, which includes the mayor and aldermen, he was con- ntly summoned to appear before the mayor and aldermen, hole including every part; and upon this foundation it to me that the removal is well enough.

erwards it was spoken to by the Solicitor General and *Willes*, who cited *Braithwaite*'s case, 1 *Vent.* 19. 2 *Keb.* where the power of removing a common council-man odged in the mayor, and such burgesses as had been s; and then the return sets out, that a common council led such a day, and *Braithwaite* being summoned did not ·, whereupon he was the same day amoved by the mayor rgesses, as the charter directs.

this case it was answered by the Solicitor, That this ex- n did not appear to have been taken in that case, nor did ear by the report, that the removal was whilst they were led as a common council, but only that it was upon the ay, which might be upon another summons to meet in istinct capacity. That it was a strange case, wherein the asserted the power of the King and Council to disfran- members of corporations by their order, and even to pull the walls of a town; so it might be they went upon such er, and every body knows matters of prerogative went gh at that time: he said no record of that case was to be *Et per* C. J. I am very glad of it; I can have no re- any opinion that was given, when Judges were worked o extravagant a pitch, as to assert such doctrine.

urnatur. And the last day of the term the Chief Justice ed the opinion of the court, that the removal in this case t regular, for there should have been a summons for the and aldermen to meet in their distinct capacity.

mptory *mandamus agard.*

le *versus* Lord Cornwallis. Pasch. 5 Geo. rot. 309.

error *e C. B.* the writ of inquiry appeared to be executed n the 15th of *June*, which upon looking into the alma- peared to be *Sunday*, and it was objected by *Reeve*, that nade void by the 29 *Car.* 2. *c.* 7.

A writ of inquiry cannot be executed on a *Sunday*, and the court is bound to look into the almanack. Fortesc. Rep. 373.

Strange contra. This objection must take its rise from clause or other in that statute, for it cannot be pretende the execution of this writ was void before. At commo things of a much higher nature than this might have been on a *Sunday*. Before the statute of 5 *Ann. c.* 9. a man have been taken on an escape warrant. *Salk.* 626. And now process of ecclesiastical courts, as citations and the may be affixed on a church door, which is a service of citations. *Ibid.* 625. A fair might be kept on a *Sunday*. *Jac.* 485. And the hundred was liable for a robbery. question therefore is, whether there be any words in the to reach this case, and I take it, the execution of a writ quiry is not such an act, as is, or was designed to be mad by that statute. The words are, "Provided also, that n "son or persons on the Lord's day *shall serve or execute* an "process, &c. but that *the service* of every such writ s "void to all intents and purposes whatsoever; and the "or persons so serving or executing the same shall be as li "the suit of the party grieved, as if he had done the same "out any writ."

Now it is observable, that there is a very material va in the penning of the latter part of this clause from the f for though it at first prohibits the serving or executing an upon a *Sunday*, yet when it comes to limit what effect proceedings shall have, it only makes the service of such void; but does not extend to annul the execution of such which are not to be served upon the party; and by the part, which gives remedy to the party grieved, that word is explained, to extend only to process which is to be serve the body or goods of a man: now the nature of executing of inquiry is not by any summons to the party, but only vate execution of a power given to the sheriff, which is jury to the party: he is not grieved by the execution writ on a *Sunday*, any more than if it were any other day statute only makes the service of writs void, but this inqu by no means be called a service of any writ, and therefore made void by the statute. And it will be no answer that by using the word *serve or execute* both in the form it is manifest the Parliament intended to take in one case as the other, for this being a statute made in restriction common law, it is to be construed strictly, and not to b by equity.

But if the statute should be thought to extend to this c I apprehend the court is confined to judge only upon the and cannot take notice that the 15th of *June* was a *Sunda* it had been specially assigned for error; and that th

not pray in aid of the almanack, in order to reverse a judg-
t. In 1 *Rol. Abr.* 524. *C.* 3. it is held, that if one of the
lamations on a fine be the 7th of *June*, which is a *Sunday*,
unless it appears on the record to be *Sunday*, the court will
take notice of it, without express averment. And accord-
y the constant course has been to assign that matter for
r. So 1 *Sid.* 300. If a writ be returnable at a general re-
, the court is not obliged to take notice what day of the
th it is. *Cro. Car.* 53. *Morris* v. *Fletcher*. There the
was returnable *die lunae prox' post quinden' Hil.* and execut-
17th of *January*; and the court would not go out of the
rd, to inform themselves that the 27th of *January* was after
return of the writ: so is 9 *Co.* 66. *Mackally's* case. 1 *Roll.*
525. *pl.* 14. By the statute of 31 *E.* 3. the sheriff's turn is
ired to be held *infra mensem post festum Paschae*; the defend-
justified for an amerciament at a court held 18th of *April.*
l though in fact that was within a month after *Easter*, yet
court refused to look into the almanacks and set it right;
then *a fortiori* you will not do it in this case, where instead
upporting the judgment the consequence will be to overthrow
And if the proclamation on a fine (which is the act of the
rt) shall not be set aside without a special assignment, surely
execution of a writ of inquiry, which is but a ministerial
, an act done out of court, shall not; according to the dis-
ction taken in *Mackally's* case, where it was held, that tho'
icial acts done upon a *Sunday* are void, yet ministerial acts
not.

Reeve replied. The intent of the statute was to prevent all
, which are proceedings in a cause, from being done on a
day. The words *serve and execute* are synonymous, so that
rice in the latter part includes execution also.

I agree the cases are as cited, but they have been denied of
years, for now the calendar is looked upon as part of the
of the land. *Salk.* 626.

C. J. By dropping the word *execute* it should seem as if no
cess was made void but such as is to be served upon the
ty: to affirm a judgment we will look into the almanack,
t I think we are not bound to do it to reverse one.

Adjournatur. And at another day all the court were of opi-
n, that the execution of the writ on a *Sunday* was void, and
t they were bound to take notice of it, without being spe-
lly assigned for error; and accordingly would have reversed
judgment, but the counsel desiring to have time to apply
C. B. it went over, and afterwards the Common Pleas was
plied to, and refused to amend, and I never heard any more
it.

Michaelmas Term

7 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Justice.*
Sir Littleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Justices.*
Sir John Fortescue Aland, *Knt.*
Sir Robert Raymond, *Knt. Attorney Genera*
Sir Philip Yorke, *Knt. Solicitor General.*

Gardner *versus* Claxton.

Where the plaintiff in error pleads to the *scire facias*, there shall be execution if it goes against him, but the writ of error shall proceed.

STRANGE moved to set aside an execution taken out on a judgment in a *scire facias quare executio non*, bec they had assigned their errors before: and cited *Heat* *Street* in this court, *Trin.* 2 *Geo.* where *Parker* C. J. lai down as a rule, that if the plaintiff in error comes in at time before execution, and assigns errors, proceedings oug be stayed on the *scire facias*, because they have had the effe it in bringing the party into court.

Upon this it was referred to the master, and upon motio his report *Reeve contra* agreed the case of *Heath* v. *Str* cited, but that it was only an extrajudicial opinion, and a the delay that would follow, if the plaintiff in error be at li to spin out the *scire facias* to the last.

The Maſter reported an old rule of court, that if the party pleads to the *ſcire facias*, and it goes againſt him; execution may be ſued out, but that the writ of error ſhall go on notwithſtanding. Whereupon the court in conſideration of the delay eſtabliſhed it as a ſtanding rule for the future, that if upon the return of the *ſcire facias* the plaintiff aſſigns his errors, then all farther proceedings ſhall be ſtayed upon it; but where he chuſes to ſtand out upon pleadings to the *ſcire facias*, execution ſhall go if it be adjudged againſt him.

The caſe of Mayo and Parſons.

What acts of the ſeſſions are removable by *certiorari*, and what not.

12 An. ſt. 2. c. 2.

BY the ſtatute 12 *An. ſt.* 1. *c.* 2. it is provided, That if any malt happens to be burnt after the duty paid, the proprietor may apply to the next quarter-ſeſſions, who are to adjuſt the *quantum*, and give him a certificate, which intitles him to receive back the duty. *Mayo* and *Parſons* were two brewers, and had a great quantity of malt that had paid duty burnt in the late fire at *Wapping*; but the ſeſſions being then very near, they could not remove the rubbiſh ſo as to make an eſtimate of their loſs before the ſeſſions was over. The following ſeſſions they made their application, where the *quantum* of the loſs was adjuſted; but then the entry of the act of ſeſſions goes on, that the juſtices being of opinion, that the juriſdiction was given only to the next quarter-ſeſſions after the fire, and there having one quarter-ſeſſions intervened, therefore they for that reaſon deny the certificate.

Serjeant *Darnall* moved for a *certiorari* to remove theſe proceedings, and cited the caſe of *Limehouſe*, where an entry of a refuſal to proceed on an appeal upon pretence of its being too late was brought up and quaſhed. But Mr. Attorney General ſhewing cauſe againſt the *certiorari* objected, that this was no order of ſeſſions, and a *certiorari* goes only to fetch up their orders: and of this opinion was the court, and denied the *certiorari*; and *Eyre* J. remembered the caſe of the Biſhop of *St. David's*, where an entry that he had prayed a prohibition for ſuch and ſuch reaſons, *et ei non conceditur*, was held to be no judgment, ſo as to be looked into and corrected upon a writ of error.

Ld. Raym. 539.

Denial of a prohibition no judgment of the court.

 Bayly

Bayly *versus* Boorne.

Of the power of a Judge of an inferior court over the proceedings before him. Fortesc.Rep.198. 3 Bac. Abr. 536. Andr.183,184. Sess. Cas. 249.

THE defendant in the beginning of the long vacati arrested by process out of the sheriffs court, an bail, and for want of a plea judgment was signed. An several motions in the court below to set it aside, the p moved here for a *mandamus*, to compel the Judge to give ment final upon the inquiry; and a rule being made t cause, the defendant produced an affidavit that he was a unacquainted with the methods of legal proceedings, an soon after the arrest he applied himself to Mr. *Bennet*, tleman of the bar, who (taking it to be an arrest out o perior court) told him the process could not be returnal the next term, against which he must employ an attor put in bail, and receive a declaration: under which adv acquiesced, and heard nothing further of the cause, till before the term, that notice was given of the executio writ of inquiry: and therefore, this being a plain surpri hoped the court would not order the Judge below to judgment, but let him in to try the merits of the cause, his proposal to bring the money recovered (which was siderable) into court. To this it was answered by the plai counsel, that there appeared no irregularity on their part upon this the question arose as to what power the Ju an inferior court had in cases of this nature.

And as to that the whole court agreed, that the Jud an inferior court could not grant a new trial, or set a verdict, for this is a power that even in superior courts i of any great standing, the first instance of any new trial in *Stiles*; and besides, the case of an inferior court ha same objection to it as there is to granting a new trial a trial at bar, *viz.* because it will be tried the second time fore the same Judge.

But they all held clearly, that for matters of irregul where the proceedings were contrary to the practice and of the court, the Judge of an inferior court might set as judgment; but whether he should be allowed to exercis discretion, in setting aside * judgments, where the plaintiff regular, was a question they said deserved consideration.

* N. B. This means judgments by confession or default, &c. not judgments upon verdicts; For it was agreed, "that an inferior court may set aside the verdict of a jury." See post. 499. S. P. settled accord.

But they waived the discussion of that point, by saying t was a middle way in the case, which was to inquire into surprize; and intimated to the Judge, that the refusal of plaintiff to try the merits, upon having the money bro

into court, was ſome evidence of fraud: and therefore they gave leave to the Judge to examine, whether there was any fraud or ſurprize, and to ſet aſide the judgment if he found any.

Upon inquiry below, the officers ſwore, that when they arreſted the defendant he aſked them by what proceſs, and they told him it was an action in the ſheriff's court.

This having deſtroyed the pretence of ſurprize, the Judge below refuſed to ſet aſide the judgment.

Between the Pariſhes of Maidſtone *and* Dething.

IT was held well enough in an order of removal, to ſhew a complaint that the party is come into the pariſh of *A.* and is likely to become chargeable, without ſaying farther, *to the ſaid pariſh of* A.

The adjudication need not mention what pariſh the party is likely to become chargeable to.

Dominus Rex *verſus* Juſtic' de Dorcheſter.

A *Mandamus* iſſued to the juſtices to ſign a poor's rate made by the churchwardens and overſeers. Before the return a motion was made to ſuperſede it, for ſeveral objections to the fairneſs of the rate; and that this would be ſpeedier and better for the poor, than to reſerve the debate of them for a formal return. *Sed per curiam*, The two juſtices are neceſſary to ſign the rate only by way of form, for it is the churchwardens and overſeers that have the power of making it; and whether it be a fair rate or not is proper for the juriſdiction of the ſeſſions, and was never intended for our examination.

B. R. will meddle with the goodneſs or badneſs of a poor's rate.

Barnard. K. B. 82.

The *ſuperſedeas* being denied, the juſtices returned, that they could not allow the rate, it not being a juſt and proper rate: and the court having before given their opinion of this upon the motion, they reſented this uſage ſo far, that they quaſhed the return, and ordered an attachment againſt the juſtices, who thereupon ſubmitted and returned *quod ratam allocavimus*.

Carbonel

Carbonel *versus* Davies.

Trin. 6 Geo. rot. 389.

Reference where to the next antecedent, and where not.

CASE upon a promissory note, set out to be 1 of *November* 1719, to pay on the 31st of *Decem* *Lee* objected that the plaintiff had brought his action b note was payable, for the word *next* does not refer to of the note, but the time the plaintiff is declaring, wh in *Trinity* term, when he is here made to say, that at t the defendant had not paid him a sum of money, whic obliged by note to pay in *December* next: and he cited of an indictment for a forcible entry into lands, *existen ten'tum* of *J. S.* and for want of *tunc*, it was held that th could not refer to the day of the forcible entry, but the exhibiting the indictment, and for that fault it was

Sed per curiam, We must take it *secundum subjectc riam*, and as a translation of the note, and then it ca otherwise than a note of 2d of *November* 1719, to *December* next, which is next after the date of the not plaintiff had judgment.

Dominus Rex *versus* Philips

Hil. 6 Geo. No. 30.

Where the defendant sets out a bad title to the office, the court will give judgment on the plea, as importing a confession of the usurpation.

INformation *in nature de quo warranto* for usurping t of mayor of *Bodmyn*.

The defendant by his plea makes title under two one 11th of *March* 5 *Eliz.* whereby the inhabitants corporated by the name of mayor and burgesses, and a pointing who shall be the first members of the corpo goes on and provides for the election of others on thei and as to the mayor it is provided, that on *Michaelm* every year the mayor, burgesses and common counci major part of them, shall assemble and nominate tw burgesses, out of whom the inhabitants are to chuse c mayor, who being so chosen should take an oath to the office of mayor for the next year and till another chosen.

The other charter was 30th *April* 36 *Eliz.* wherein the Queen reciting the former manner and time of election and the continuance in the office under such election, and reciting further that the corporation had petitioned her, *quatenus* she would alter *modum et tempus eligendi* of the mayor; therefore she, confirming all their former rights and privileges, appoints the election to be for the future by the mayor, common council, and town clerk, on the 24th of *September pro uno anno integro tunc proxime sequen'*. And then he avers, that as well before as since the second charter, the usage has been, for the mayor to hold over till another was chosen, and that he being elected mayor served for a year, and the town clerk being then dead, and no new one chosen, there could be no new election of a mayor; *et eo warranto* he claims to hold the office of mayor till another shall be elected and sworn, and traverses the usurpation.

The Attorney for the crown prays *oyer* of the last charter; which being set out, there appears a further clause, whereby the Queen abolishes all the former manner *eligendi*, *nominandi*, *et appunctuandi* of the mayor; and then takes issue, that since the charter of 36 *Eliz.* there has been no such usage of holding over: which goes down to trial, and is found for the King.

It was now moved in arrest of judgment, that this was an immaterial issue, because it not being a corporation by prescription, the title to the office must depend upon the charter, and not upon any usage within time of memory; and that this is worse than most cases of immaterial issues, for they are often good if found one way, and bad the other, (as *solvit ante diem* is good if found for the defendant:) But here the finding for the King can neither destroy, nor could a verdict for the defendant have established his right; because his right does not depend on any usage inconsistent with the charter, but must stand or fall by the charter itself. Immaterial issue.

And without much argument the court was clear in opinion, that this was an issue totally immaterial. But then the question arose, what the court should do in this case, whether they were to award a repleader; or, laying the replication out of the case, proceed to give judgment on the defendant's plea.

And for a repleader it was argued by Mr. Solicitor General, that the court could not give judgment on the plea, for every judgment must be either, 1. On an issue in fact, found by verdict. 2. Issue in law, on demurrer. 3. *Nil dicit*. Or, 4. Confession. 1. As to the first, it is admitted there is no good issue in fact, and consequently no good verdict to found the judgment

ment upon. 2. Here is no iffue in law, for want of a demurrer. 3. It cannot be by *Nil dicit*, for the defendant has pleaded. 4. The only queftion is, whether this plea can be taken to be a confeffion of the ufurpation; and I take it, it cannot, for though an ufurpation is charged, yet it is fo far from being confeffed, that he exprefly denies it in his traverfe; and relies upon it that he has a good right: he admits the ufer, but not the ufurpation; the charge upon him is, that he has exercifed this office without lawful authority: it is true, fays he, I have exercifed this office, but I infift that I had a good authority fo to do; and now will any body fay, this is a confeffion of the ufurpation?

But then it is objected, that if the title fet out is ill in point of law, then the admiffion of the ufer is a tacit admiffion of the ufurpation. To this I anfwer, 1. That the title is good in law under the two charters, taking them together. By the firft charter the mayor being elected by the inhabitants on *Michaelmas-day* is to hold for a year, and till another is chofen. The fecond charter, which was made to alter the *tempus et modum eligendi* only, fays he fhall be chofen by a felect number, and upon 24th *September*. But it does not meddle with the right of holding over; on the contrary it exprefsly confirms all their former rights and privileges, of which this of holding over was one. And it will be hard to fay, that an alteration in the manner of *electing* only, fhall take away the former right which the officer when *elected* had in the office, efpecially in a point which tends fo much to the prefervation of the body corporate.

2. But if the plea fhould be ill in point of law, yet the court cannot give judgment that it is fo, till it comes properly before them. If they may, then whenever a vicious plea is put in, the court may without the party's anfwer or demurrer give judgment upon it immediately; and that will be the cafe here, for now the replication is out of the cafe, and we ftand before the court only upon the information and the plea. In 1 *Lev.* 32. *Serjeant* v. *Fairfax*, the iffue was held immaterial, and the defendant's plea a naughty plea, but yet the court did not give judgment upon it, but awarded a repleader.

Pengelly Serjeant *contra*. The defendant in his plea has made no good title to this office, for the fecond charter is what he muft ftand or fall by, and in that there is no provifion for holding over.

But fay they, in the firft charter there is, and that continues in force as to every thing in which it is not altered by the fubfequent charter.

The

The force of this depends upon that queſtion, whether the ſecond charter is not the entire rule to go by as to the office of mayor. And that it is, is plain from the clauſe which aboliſhes all the former method of election, and if the former method of election be aboliſhed, ſurely an incidental right under ſuch election will be gone alſo. The right of election is transferred to other perſons, and can there be a duration under an election, when the foundation of that holding over is gone? *Pro uno anno integro* is the ſame as if *tantum* had been added, and the acceptance of the charter is general, without any reſervation of the former right of holding over. 1 *Ven.* 297. 2 *Mod.* 95.

And as the plea is ill, we take it judgment may be given upon it, for he has confeſſed the uſer; and as to the traverſe of the uſurpation, that is ſo immaterial, that in Sir *Peter Delme's* caſe, and the caſe of *Honiton*, it was held, the crown could not take iſſue upon ſuch a traverſe. Whoever admits a uſer, confeſſes at the ſame time that he is guilty of an uſurpation, unleſs he makes a title to the franchiſe; as in the common caſe of a juſtification in treſpaſs or for words, where it amounts to no juſtification in law, judgment may be given upon the confeſſion. 2 *Roll. Abr.* 98. *pl.* 2. 99. *pl.* 1. 3. *Cro. Eliz.* 228, 214. 22 *Ed.* 4. 46. *b.* *Salk.* 173.

Mr. Solicitor General replied. The corporation could not do any otherwiſe than accept the charter in general, for it cannot be accepted in part, or with qualifications. I agree *tantum* is implied in charters of original creation, but not in charters of confirmation.

Chief Juſtice. We are moved on behalf of the defendant, that we will grant a repleader: that is in other words that we ſhould give this cauſe a further delay, whilſt he is holding over all the while. Now conſider, that if we ſhould grant it, the defendant cannot mend his caſe: for the plea will ſtand, and after the formality of a demurrer we muſt give judgment upon the goodneſs or badneſs of the plea. The attorney for the crown does not pray a repleader, neither would the granting one do him any good, for we cannot better his caſe, but muſt reſt it upon the demurrer. And therefore, as it will anſwer no good purpoſe either way, we certainly will not grant a repleader, if there be a more expeditious way of coming to the end of the cauſe; and I think there is, for if the plea be ill, I am of opinion it amounts to a confeſſion of the uſurpation, and that is warrant enough to ground our judgment upon.

By Lord *Mansfield*, accord. 1 Bur. 292.

Now the validity of the defendant's title, as he makes it in his plea, depends upon the queſtion, whether the right of hold-

ing

ing over ſubſiſts under the ſecond charter. And I hold it does not; for it is very obſervable, that the ſecond charter, where it recites the former, takes expreſs notice of the clauſe for holding over; and then when it comes and aboliſhes all the former method of election, and appoints it to be in another manner, and that the mayor ſhall continue in for a year, it cannot be imagined but that this right of holding over was intended to be aboliſhed alſo. Suppoſe the ſecond charter had ſaid, that the mayor ſhall continue in for three quarters of a year; will any body ſay, that the reſervation of their former privileges ſhould intitle him to hold on for the other quarter under the old charter; I believe no body will think ſo; I think this is not to be diſtinguiſhed from the caſe of an ill juſtification in treſpaſs, and therefore as the plea is ill, and contains no title to the franchiſe, I am of opinion, we may give judgment upon it, as confeſſing an uſurpation.

Powys Juſtice. I am of the ſame opinion, for if we ſhould grand a repleader, I do not ſee how we can have any new light in the cauſe.

Eyre Juſtice. If the defendant's plea had confeſſed the uſurpation, I ſhould think it proper enough to give judgment upon the plea: but I do not think any more is confeſſed by it than the uſer. The ſecond charter it is plain was made only for particular purpoſes in relation to the election, but meddles not with the duration in the office; and therefore I can never agree, that any affirmative words in the charter can take away ſo great a privilege as that of holding over is, and a privilege too that may often ſerve to prevent the extinction of the corporation; eſpecially when it provides that all the former rights of the corporation, not altered by the ſubſequent charter, ſhall ſtill continue. And as to the clauſe of abolition, that is expreſly confined to the authority, form and manner *eligendi*, but not a word of any right *tenendi*.

I think he is not a new mayor abſolutely, but as to the right of holding over it ſubſiſts in him under the former charter; the conſequence of which is, that he has confeſſed no uſurpation, and then no judgment can be given againſt him upon the plea.

Forteſcue Juſtice. The defendant cannot mend his caſe, becauſe the plea is good in form, though not in fact; which is a diſtinction always taken into the doctrine of repleaders: and of this opinion was *Holt* Chief Juſtice in the caſe of *Jones* v. *Bodinner*, *Salk.* 1. where he ſaid, that if the fact be admitted, there ſhall be no repleader, but a judgment upon the confeſſion.

Here

e the defendant admits the ufer, and then the ufurpation ›nfequence of law, and that is the reafon why it is not tra- ıe. Every juftification, to make it a perfect one, muft :onfefs and avoid; and where it does not do the latter, the lion ftands.

to the merits of the plea, I think the power of holding ›er is gone upon the fecond charter; for the *modus eligendi* in all the circumftances of the election, and the duration office is one of thofe.

fides, as the day of election is altered, there can be now no ng over under the old charter, for that only empowers him it from *Michaelmas-day*; but then what right has he to over from the 24th of *September* till that time? I am of on that judgment may be given immediately.

r curiam, Judgment for the King. And the corporation ioned for a new charter.

Taylor *verfus* Dobbins.

Cited in 2 Ld. Raym. 1377.

Pafch. 6 Geo. rot. 183.

I cafe upon a promiffory note, the declaration ran, that the lefendant made a note, *et manu fua propria fcripfit*. Excep- was taken, that fince the ftatute he fhould have faid that the ndant figned the note, but the court held it well enough, ufe laid to be wrote with his own hand, and there needs no cription in that cafe, for it is fufficient his name is in any : of it. *I. J. S. promife to pay*, is as good as I promife to , fubfcribed *J. S.*

If the note be of the defendant's own writing, it need not be faid in the declaration, that he figned it. 2 Ld. Raym. 1484. S. P.

Mills *verfus* Bond.

Trin. 6 Geo. rot. 382.

N debt on a bail-bond, exception was taken, that the original procefs appeared to be returnable at a day out of term. *akerley* faid, they fhould have pleaded the ftatute of *Hen.* 6. ıt the court held it not neceffary, this being a void procefs. nd the plaintiff prayed leave to difcontinue.

Writ returnable out of term avoids bail-bond taken on it, and that without plea. Fortefc. Rep. 363.

Perry

Perry *verfus* Edwards.

Paf. 6 Geo. rot. 83.

A covenant to fave harmlefs againft all perfons, extends not to tortious acts; *fecus* where it is particular againft the acts of a particular perfon.

ERROR *e C. B.* in an action of covenant, wherein the plaintiff fets forth a covenant, which recites, that the defendant had fold a certain quantity of goods to her teftator, which had been arrefted at *Archangel* by one *Edward Bell*, and therefore the defendant covenants to fave him harmlefs from any cofts or damages relating to fuch feizure: and then affigns for breach, that the faid *Edward Bell* having arrefted the faid goods *praetextu* of a debt due from the defendant to him, touching which arreft the teftator was put to 1500 *l.* expence, which the defendant had neglected to pay.

There were feveral pleading in the caufe, which are now out of the cafe, the queftion turning upon the declaration.

To which *Wearg* objected, that the covenant does not extend to tortious acts, for which the plaintiff had a remedy; and therefore the title of *Edward Bell* ought to have been fet forth, 4 *Co.* 80. *Vaugh.* 118. *Cro. Car.* 443. and that *habens legale titulum* is not enough. 2 *Saund.* 177. 1 *Mod.* 219. 2 *Ven.* 61. *Cro. El.* 828. *All.* 41. *Mar.* 40. Here it is only faid *praetextu*, which is not fo much.

Reeve contra, agreed it to be a general rule, that in thefe cafes the plaintiff muft fhew a title in the difturber; but then it extends only to the cafe of a general covenant, and not where it is particular againft the acts of particular perfons, for there it takes in even tortious acts. *Cro. El.* 212. *Hob.* 35. 1 *Roll. Abr.* 431. 2 *Lev.* 37.

Et per curiam, This pretence of *Bell*'s being recited in the covenant, fhews it was meant a fecurity againft it in all events; and though it fhould be tortious, yet being particular, it comes within the difference that has been well taken.

Adjournatur. And *Hil. fequen'* the plaintiff had judgment, the defendant's counfel declining to argue it.

Hillier

Hillier *versus* Froft.

Scire facias not amendable.

THE court at the fide bar made a rule to amend the return of a *fcire facias* from *die Veneris in craftino fancti Martini* to *die Sabatti*, *Friday* being the feaft of *St. Martin*; and now *Ketelbey* moved to difcharge it, becaufe not a proper motion for the fide bar; nor can the court amend the writ, but the proper way would be to quafh it. I was counfel in maintenance of the rule, but had little to fay for it, fo it was difcharged; and I moved to quafh the writ, which was ordered accordingly.

Rex *verfus* Gwyn Major' de Chrift-Church.

What copies of corporate acts may be given in evidence.

ON a trial at bar the queftion was, whether *A. B.* at the time he did a corporate act, was an out burgefs or not. And to prove he was, the defendant, who had a rule for copies *omnium librorum et recordorum burgi' praed'*, produced a copy of a letter fifty years old, and found in one of the corporation chefts, wherein *A. B.* is mentioned to be of another place; but the court refufed to hear it read, becaufe not a corporate act within the rule, fo that a copy is not evidence, but the original ought to be produced.

Webb *verfus* Thompfon.

Efcape warrant fuperfeded, becaufe the party was intitled to be difcharged at the time of the efcape.

IN *Michaelmas* 6 *Geo.* the plaintiff brought his action, and the defendant put in bail, and in *Hilary* following iffue was joined, and notice of trial given and countermanded, and the defendant was the fame term furrendered in difcharge of his bail. He lay all *Eafter* and *Trinity* term, and in the vacation made his efcape, upon which the beginning of this term an efcape warrant iffued againft him, which *Short* now moved to fuperfede, becaufe the plaintiff having flept three terms, the defendant was intitled to be difcharged upon common bail. I oppofed this, becaufe he had been guilty of an efcape, and therefore intitled to no favour, but he ought to lie till he has tried it by provifo. *Et per curiam*, He is not indeed proper to pray a favour, but it would be hard he fhould lie by till you think fit to try the caufe; for it is not to be fuppofed one who cannot find bail fhould be able to bring it on by provifo. And befides, as foon as he is taken upon the efcape warrant, he will be intitled to his difcharge by the rules of the court; fo that to prevent the multiplying vexation and expence, we think proper to fuperfede the warrant.

Gynn *versus* Kirby.

Attorney ordered to pay the costs, where no plaintiff to be found.

THE plaintiff's attorney was summoned before Mr. Justice *Fortescue* to produce his client; and the Judge thereupon made an order, that unless he was produced in a month, the defendant should by consent be at liberty to sign a *non pros.* He did not produce him, and the *non pros.* was signed: and upon an affidavit that we could find no such man as the plaintiff, the court on my motion made a rule upon the attorney to pay the costs; and afterwards upon an affidavit that they were demanded and unpaid, I moved for an attachment against him, which was ordered accordingly.

Between the Parishes of Barleycroft *and* Coleoverton in com' Rutland.

Where a certificate-man is sent back, there needs no adjudication of his not gaining a settlement during his stay; and if it appears the certificate was legally allowed, that supplies the want of shewing an attestation.

ORDER of removal from *B.* to *C.* reciting that the party had fifteen years since come with a certificate allowed according to the act of Parliament from *C.* to *B.* and being now actually chargeable, they send him back to *C.*

This was moved to be quashed: 1. Because they do not say that during the fifteen years he gained no settlement in *B.* for a certificate-man may gain a settlement as well as any other. *Sed non allocatur*, for all that is necessary to be shewn is the certificate, and that the party is chargeable, and the length of time makes no difference.

Second exception. It is not said the certificate was attested, but only that it was allowed. *Sed per curiam*, The attestation is by the statute made previous to the allowance, and therefore when they say it was allowed according to the act of Parliament, we must intend it was attested, for otherwise it could not be so allowed. The order was confirmed.

Reeve *versus* Trindal.

Defendant in appeal of murder cannot be bailed after conviction, without consent of appellant. Com. Rep. 2[illegible]7. cited in Andrews 142.

ON the trial of the appeal there were two issues. The first as to a plea in abatement, where the defendant pleaded that he was not a labourer according to the addition of the writ, but a barber chirurgion; which was found with the defendant. The second was upon his plea over to the felony, where the jury

jury found him guilty of the murder. And what would be the confequence upon thefe two verdicts, was a point to have been argued in court. But neither fide bringing it on for near three years, the defendant now moved to be bailed, and the appellant faid he did not oppofe it. *Sed per curiam*, We cannot do it: he is convicted of murder, and therefore we cannot bail him, unlefs the appellant will actually confent; which he refufing to do, the defendant was remanded.

Galley *verfus* Serjeant Selby. In Canc.

In equity th mortgagor prefents to a livi S. C. Com. R 343.

IT is a rule in equity, that though in the cafe of a mortgage in fee the legal right of prefentation is vefted in the mortgagee; yet they will interrupt that prefentation, and compel the ordinary to inftitute the clerk of the mortgagor any time before foreclofure; it not being any part of the profits of the eftate. 2 *Vern.* 401.

Heath *verfus* Percival. In Canc.

On a bill to di cover affets, equity can pro vide for payme of the debt. 1 P. Will. Re 682.

THE defendant's teftator was partner with Sir *Stephen Evance*; and upon breaking up the partnerfhip it was agreed between them, that all joint bonds by them entered into fhould be difcharged by Sir *Stephen* only; who had an allowance made him for that purpofe.

The plaintiff was a bond creditor of the partners, and fome time after the diffolution of the partnerfhip applied himfelf to Sir *Stephen Evance* for the money; upon which they two came to an agreement, that the bond, which before carried 5 *l. per cent.* fhould for the future ftand out at 6 *l. per cent.* and fome intereft at the rate of 6 *l. per cent.* was paid accordingly.

Thus it ftood when Sir *Stephen Evance* broke, againft whom there was a commiffion of bankruptcy, and the plaintiff came in and had his dividend; and now brings his bill againft the defendant, who is the furviving executor of the other partner, to difcover affets, and compel him to redeem the bond.

The defendant by his anfwer confeffes affets, but relies on the notoriety of the diffolution of the partnerfhip, and the agreement as to bond creditors, of which the proofs had affected the plaintiff with notice, and that his coming afterwards to an agreement with Sir *Stephen Evance* to let the bond ftand out on the advance of 1 *l. per cent.* and taking his dividend on the commiffion, were a ftrong evidence of the plaintiff's difcharging his

 teftator;

teſtator; and that it was his own laches not to take his money, Sir *Stephen* having continued to pay for many years after the partnerſhip expired.

Lord Chancellor. Both parties being now before the court, and no diſpute as to the bond or aſſets; I think it proper to retain the bill, without ſending them to law. As to the agreement between Sir *Stephen Evance* and the defendant's teſtator, that was *res inter alios acta*, which ought not to prejudice the plaintiff, as it will do if it be of any avail, becauſe it tends to leſſen his ſecurity. I do not think the ſubſequent agreement for 1 *l.* *per cent.* advance has altered the caſe, for the other partner might notwithſtanding have come in and been diſcharged on paying the principal and intereſt at 5 *l.* *per cent.* Neither does the plaintiff's taking a dividend prejudice his right at all, for that was an advantage to the defendant, by leſſening the debt, ſo that now he will have an allowance for what the plaintiff received upon the dividend.

Let the maſter take an account of what is due for principal and intereſt at the rate of 5 *l.* *per cent.* and on payment of that, let the bond be delivered up, deducting the money already received upon the dividend.

Leighton *verſus* Leighton. Ibid.

[...]petual in[...]ction granted [...]er two trials [...]ar. [...]. Will. Rep. [...]

AFTER two verdicts on trials at bar in favour of the plaintiff's title a perpetual injunction was decreed, according to the caſe of Lord *Bath* v. *Sherwin* in the Houſe of Lords; which practice was introduced that the right might be quieted in ejectments, (where at law the party is always at liberty to bring a new one) as it was in real actions where the verdict was final. And this was affirmed in the Houſe of Lords.

N. B. There had been ſeveral country verdicts to the contrary, but the trials at bar were laſt.

Dominus Rex *verſus* Drew.

[...]*beas corpus.*

DEFENDANT came up on a *habeas corpus* from the *Savoy*, to which it was returned, that for ſeveral years laſt paſt the *African* company have been a body corporate, and retained the defendant in their ſervice, and ſent him to the *Savoy*, to be provided with neceſſaries, till he ſhould imbark for *Africa*, *et haec eſt cauſa*, &c. The court diſcharged the defendant for the inſufficiency of the return, and ordered an information againſt the colonel who liſted the men, and the keepers of the *Savoy*.

Poultney

Poultency *versus* Holmes.

At nisi prius *in* Middlesex B. R.

THE defendant having a term for years, whereof one year and three quarters was to come, agrees with the plaintiff, that he should have the premisses for the remainder of the term, paying to the defendant the same rent as was reserved upon the original lease. The plaintiff took possession, and now brings trespass against the defendant for a re-entry.

If the lessee reserves the rent to himself on granting over, it is an under-lease, and not an assignment, though he parts with the whole term. See Ld. Raym. 99.

It was objected, that this amounted to an assignment of the lease, and was therefore void by the statute of frauds and perjuries, not being in writing; to which we who were for the plaintiff answered, that it must be taken as a lease, and not as an assignment, because the reservation was to the lessee, and not to the original lessor; and the lessee might maintain debt for rent upon it, though he could not distrain for want of a reversion; and of this opinion was the Chief Justice, and my client obtained a verdict.

Dominus Rex *versus* Pattle. Ibid.

THE defendant being owner of several houses in *St. Catharine's*, let the rooms out to several families: and for this was indicted on the statute about inmates; but the Chief Justice ruled it not a case within the statute, for the house was not a cottage, and all the new buildings about town would be liable to the same prosecution, there not being four acres laid to any of them: and he held further, that the proviso in the statute for market towns would take in this case; for in this respect, as far as the houses are contiguous, *Wapping* is part of the town.

What a cottage within the statute 31 *Eliz.* c. 7.

As far as the houses are contiguous they are part of a market town. *Rex* v. *Crockford*, *Trin. sequ.* held so of *Enfield*.

Campion *versus* Nicholas. Ibid.

THE cargo of the ship was lost by the capture of a *Swedish* privateer, who carried her into *Gottenburgh*: the master staid there three months, to refit the ship, and take in new lading; and to prevent the seamen from going away, he agreed to pay them so much *per* month whilst they staid there: and in an action for this, the master would have discharged himself, on the rule that freight is the mother of wages, and that none are ever paid while the ship is lading and unlading; which the

The admiralty law for wages may be superseded by a special agreement.

Chief Juftice agreed to be the general doctrine: but he held it not fufficient to controul a fpecial agreement, as there was in this cafe, and where too there was fo long a ftay at *Gottenburgh*.

Tefhmaker *verfus* Hundred de Edmington in com' Middlefex.

At nifi prius coram King *C. J.* de C. B.

If party is robbed on a *Sunday* going to church, the hundred is liable. S. C. Com. Rep. 345.

THE plaintiff lived a mile from the church, and going thither with his lady in his coach upon a *Sunday*, was robbed; and brought his action againft the hundred, and recovered; for the ftatute extends only to the cafe of travelling: but the Chief Juftice faid, if they had been going to make vifits, it might have been otherwife.

Dutch *verfus* Warren.

At Guildhall coram King *C. J.*

On a contract for ftock the party who has the difference in his hands is receiver of fo much to the other's ufe. Sel. Caf. Evid. 66.

CASE for money had and received to the plaintiff's ufe. The cafe was, the plaintiff paid money on a promife to transfer ftock at a future day, which not being done the plaintiff brought his action. At the trial the doubt was, whether the plaintiff had brought a proper action, becaufe at the time this money was paid, the plaintiff never intended to have it again; and the promife to transfer the ftock was a fufficient confideration for his parting with the money. The Chief Juftice directed, the court fhould be moved; and they were all of opinion, that the action was well brought; not for the whole money paid, but the damages in not transferring the ftock at that time, which was a lofs to the plaintiff, and an advantage to the defendant, who was receiver of the difference money to the ufe of the plaintiff.

Hawkins *verfus* Perkins.

At Guildhall coram Pratt *C. J.*

Where bail are obliged to give evidence, and where not.

CASE upon a note. The plaintiff called one of the defendant's bail to prove the hand; and whether he was bound to give evidence was the queftion. The Chief Juftice faid, if he was a fubfcribing witnefs, he would oblige him; but otherwife he would leave him to his liberty.

Anonymous.

Anonymous.

Coram King *C. J.* *at* Guildhall.

A Man paid money on a contract for the old stock of a company, and the party gave him so many shares in the additional stock. Upon this the other brings his action for the money, as so much money had and received to his use. And the Chief Justice held, it well lay, because the thing contracted for was not delivered: he said it would have been otherwise, if the thing contracted for had been delivered, though to a less value.

Where money is paid and the thing contracted for not delivered, it is money received to his use.

Anonymous. In Canc.

A Makes his will, and devises 300 *l.* to his daughter, provided she married with the consent of her mother, otherwise only 200 *l.* After this in his own life he marries her, and gave 200 *l.* with her. And this was held a revocation of the devise, so as to deprive her of the other 100 *l.*

Marriage portion a revocation of a devise.

Rex *versus* Major' et Jurat' de Dover.

MANDAMUS teste 14th of *November*, returnable 28th, was moved to be superseded, for want of fifteen days between the *teste* and return: upon this the practice was inquired into, and agreed to be, and settled accordingly, that where the party lives forty miles from *London*, there must be fourteen days, otherwise only eight days, and that one is to be taken inclusive and the other exclusive; so that a writ *teste* 14th may be returnable the 28th.

How many days there ought to be between the *teste* and return of a *mandamus*. 11 Mod. 64. pl. 1. *Vide* Salk. 434, *contra*, but the rule of that Case was produced, and it appeared to be fourteen and not fifteen, as expressed in the report. It had indeed the words *ad minus*, but yet held, one should be inclusive and the other exclusive.

Williams *versus* Fowler.

Mich. 6 Geo. rot. 113.

ERROR of a judgment in *C. B.* in an action upon the case against the defendant as administrator of *J. S.* for work and labour done in the intestate's time: the defendant pleads, that the intestate in his life was indebted to *A. B.* in 11 *l.* for goods sold and delivered, and neglecting to pay in

Executor may plead an erroneous judgment. Lill. Ent. 252.

 his

his life, the ſaid *A. B. Michaelmas* 5 *Geo.* impleaded the defendant as adminiſtrator *in placito debiti ſuper mutuat'*, *taliterque proceſſum fuit*, that judgment was given for the plaintiff. Then he pleads another judgment for a debt of the ſame nature, and recovered in the ſame manner; and a third which was for money lent; and a fourth like the two firſt. Then he avers that all theſe were for good and juſt debts, and that he has adminiſtred all the goods to 100*s.* which are liable to theſe judgments. And hath not aſſets *ultra*.

Demurrer inde et jud' pro defendente, after two ſolemn arguments in *C. B. ubi intratur*, *Hil.* 5 *Geo. rot.* 1587. and error brought in this court.

Reeve pro quer'. Though the debts are averred to be true, yet being recovered in improper actions, they can be no bar to us. The debts are ſtill ſubſiſting as debts upon ſimple contract, and ſo are not pleadable to us. The adminiſtrator, if he ſhould be ſued in an action for goods ſold and delivered, could never plead theſe judgments (which are in actions of debt) in bar. In 1 *Ven.* 198. *aſſumpſit* againſt an executor, he pleads four judgments, one whereof was in an action of debt for a principal ſum and intereſt borrowed by the teſtator; and on demurrer it was adjudged for the plaintiff, becauſe no action of debt lay for intereſt: and though the defendant had not taken advantage of it by plea, it was ſaid no admiſſion of his could prejudice the other creditors. In the preſent caſe, if the defendant had made a proper defence, the plaintiffs could never have recovered in thoſe actions.

Wearg contra. That phraſe *placitum debiti ſur mutuat'*, is not confined to money lent only, as *placitum debiti* generally is; for that is the known deſcription of an action of debt, but this is not. When I deliver goods and am not paid, I may properly be ſaid to be a lender of the money which I truſt. Suppoſe the ſeller lends the buyer the money with one hand and receives it with the other; ſurely that will not deprive him of his action for money lent. It may be there were in the declarations proper counts added to reach theſe demands.

But if *mutuat'* be inconſiſtent, you will reject it, as you do an inconſiſtent *poſtea* under a *ſcilicet.* In this caſe we have done more than we needed, for there was no occaſion to aver
1 Sid. 333. the recovery *pro vero et juſto debito*, or even to have ſhewn how it accrued. 1 *Lev.* 200. *Lutw.* 662. The plaintiff might have replied, there was nothing due, and was not driven to his demurrer. *Jones* Sir *William* 91, 92. The caſe in

Ven.

t. is not at all applicable, for there was no debt which would a lien upon the executor, but here there is a real debt.

One of thefe judgments is out of the exception, the debt ng for money lent, and properly recovered, and that covers the affets, and deftroys the plaintiff's action; for he muft id fo many of the judgments, as that it will appear there are ts, according to the cafe of *Dee* v. *Edgecomb* in *Vaugh.* t here according to his own reckoning he has avoided but ee, and the fourth, which is for more than the affets, re-ins unimpeached.

It was argued a fecond time by Serjeant *Comyns* for the intiff, and Serjeant *Miller* for the defendant.

Serjeant *Comyns*. On a fpecial *plene adminiftravit* (as this is) executor muft bar us by good judgments, and not by fuch are erroneous. 8 *Co.* 133. 3 *Lev.* 141. 9 *Co.* 108, 110. *b.* *ll.* 312. Indeed it is otherwife in cafes where the admini-ator might have pleaded it in abatement, but this is not a atter avoidable by plea, it appearing upon the face of the cord. An action of debt it is true will lie upon an executory omife, but then the party muft declare according to the uth.

Suppofe in an action for money lent the parties had gone to ie, and on the trial it had appeared, that the fame demand is the price of goods fold and delivered, no doubt but in it cafe the plaintiff would have been nonfuit: and here it ll be the fame thing, fince that which would have turned n round upon the evidence, appears now upon the record.

There may be a great deal of fraud in allowing this prac-e, for thefe judgments are entered up immediately, *pendente* of another perfon, when if they were to go on in the ordi-ry way by writ of inquiry, that other perfon perhaps might ve got judgment firft. And if thefe judgments are errone-s, then the executor has the benefit of them in covering fo uch affets, and may get rid of them afterwards, when he has ved his turn.

Serjeant *Miller contra*. This is at moft but an improper tion, and the whole record not being fet forth, you will end there was another count proper to take in the demand. thefe cafes the true point is, whether there be a juft debt not. *Lutw.* 662. 1 *Sid.* 230. 1 *Keb.* 808. *Vaugh.* 94. *id.* 333. An erroneous judgment is pleadable, till reverfed. . *El.* 471. Sir *W. Jones* 91.

C. J.

C. J. Both ſides have gone upon begging a queſtion, for which I think there is no foundation; which is, that theſe judgments are erroneous. For conſider, though the recital of them is, that the defendant was indebted for goods, and im-pleaded in a *mutuatus*, yet that is more than will appear upon the record of thoſe judgments, which are only common *mutuatus*'s. The moſt that the ſpecial ſetting them out amounts to is, to ſhew there was a precedent debt, and that the judgments were not fraudulent; and this is more than the pleader needed have done, for he might have relied upon it, that there were ſuch judgments, without ſhewing the conſideration of them, the want of which ſhould come of the other ſide, and be taken advantage of in an iſſue upon the fraud. Here the executor has done more than he was obliged to do; he has ſhewn that there were ſuch judgments, and leſt you ſhould think theſe were demands ſet up on purpoſe to cover the aſſets, he tells you further that there was a fair and honeſt debt recovered by them. I think the judgment ought to be affirmed. To which *Powys* and *Forteſcue* Juſtices agreed. *Et per Eyre J.* There is no inconvenience in letting executors confeſs judgments, for if there be a precedent debt, all is fair; if none, the party will have them upon the fraud. I think this is a good judgment; though if it were erroneous, it might be a bar, for all we have to look to is to ſee it is not fraudulent. Where *intereſt* is damages, debt will not lie, but it is otherwiſe where a ſtated intereſt is fixed at a ſtated rate. The judgment of *C. B.* was affirmed.

Hilary

Hilary Term,

7 Georgii Regis. In B. R.

John Pratt, *Knt. Lord Chief Justice.*
Littleton Powys, *Knt.*
Robert Eyre, *Knt.* } *Justices.*
John Fortescue Aland, *Knt.*
Robert Raymond, *Knt. Attorney General.*
Philip Yorke, *Knt. Solicitor General.*

ominus Rex *versus* Inhabitantes de Bicham.

HE sessions setting out the fact specially, adjudge the settlement of a poor person to be at *Bicham*, because when he lived in that parish he executed the office of or of the duties given by the 6 & 7 *W.* 3. *c.* 6. on births rials.

Executing the office of collector of the duties on births and burials, gives a settlement.
6 & 7 W. 3. c. 6.
3 & 4 W. 3. c. 11.
Fortesc. Rep. 304.
Fol. 173.

eant *Darnall* moved to quash it, because this was not a office, and it would be giving the commissioners (who appoint the collectors) a power to bring what charge ould upon the parish: besides, it was not stated in the that this was an annual office, as it must be to give a ent within the express words of 3 & 4 *W.* & *M.* *c.* 11.

ve contra, cited the case, *Hil.* 9 *Ann. between the parishes Mary* and *St. Lawrence in Reading*, where it was held e execution of the office of warden over all the parishes town of *Reading* (which office was in the nature of that thingman) gave him a settlement in that parish where he

Et

becaufe it appears on looking into the ftatute that th given the commiffioners is to appoint a perfon who collector of the duties for a year, and then give in his a It has been held a fettlement in the cafe of the land- why not in this? The order was confirmed.

Shepherd *verfus* Shorthofe.

Mich. 7 Geo. rot. 83.

If the probate be loft, the executor may declare on an exemplification of it.

CASE by the executors of the affignee of commiff bankrupt for goods fold and delivered by the b the defendant prays *oyer* of the letters teftamentary, v fet out, and then demurs. And *Strange* for the defen jected, that the declaration was of *Trinity* term, w executor fays that he brings into court the letters tefta by which, fays he, *fatis liquet* to the court that I am of the will, *et inde habere execution'*, *&c.* Whereas u it appears that the inftrument produced under feal of dinary does not bear date till *November* following, fo jection is, that the executor declares before probate, to all the cafes, where it is held that though he m mence an action, yet he cannot declare in it before p

To ftate the objection fairly, I do admit, that the l the ordinary, which are fet out, do recite that 13 *Ja* the will was exhibited, *probatum et approbatum*, which the action; but this is not fufficient, for though the exhibited, and though evidence was given to fatisfy t

le will, with that further circumſtance of its being under ſeal of the ordinary; for unleſs they were ſo under ſeal, it could not *ſatis liquere* to the court, that he was executor.

Sed per curiam: The inſtrument here produced is not the probate, but an exemplification of it; and that ſhewing there was a probate before the action, is ſufficient: this is their conſtant way, when the probate is loſt, for they never grant a ſecond probate, only exemplify the firſt, and thoſe exemplifications have been allowed to be given in evidence. The plaintiff had judgment.

Dominus Rex *verſus* Buckland.

THE court was moved to deprive one in cuſtody on an *excommunico capiendo* of the benefit of the rules; but on conſideration and ſearch for precedents they refuſed to do it.

One in cuſtody on *excom' cap'* is to have the benefit of the rules.

Anonymous.

THE mortgagee after the day of payment brought an ejectment, and the court ordered him to ſhew cauſe, why on payment to the leſſor, or bringing into court, principal, intereſt and coſts, proceedings ſhould not be ſtayed: and [illegible], who moved it, ſaid, it was done often in *C. B.*

Dominus Rex *verſus* Newton et al'.

BY the ſtatute 1 *Geo. c.* 13. § 11. it is enacted, that any two juſtices of peace may ſummon any perſon to take the oaths before them; and if they do not appear, then on oath of ſerving ſuch ſummons, the juſtices are to certify the ſame to the quarter ſeſſions, where if the party ſo ſummoned does not appear to take the oaths, he ſhall ſtand convicted of recuſancy. The defendants were juſtices of the peace, and iſſued their ſummons accordingly; but coming afterwards to underſtand, the party was a gentleman of faſhion, and not ſuſpected to be againſt the government; leſt a tranſaction of this nature ſhould be an imputation upon him, they refuſed to give the proſecutor his oath of the ſervice of ſuch ſummons, that the matter might go no further. And now upon motion againſt them for an information, the court declared, that the juſtices had no diſcretionary power to refuſe to put the act in execution, and therefore granted an information againſt them.

Juſtices of peace have no diſcretionary power as to tendring the oaths, when application is made. 1 G. 1. c. 13. ſ. 11.

of the issue, the better to enable him to comply with

Dunsley *versus* Westbrowne.

At Guildhall coram Pratt *C. J.* de B. R.

Where the master brings trespass *per quod servitium amisit*, the servant beaten is no witness. Sel. Cas. Evid. 70.

TRESPASS for beating his servants, *per quod amisit*; the plaintiff called one of the servants the case. I objected, that he having a right to bring in his own name, it was in effect swearing for himse must be under a byass, because what he says now oath, may be given in evidence against him in his ov The Chief Justice inclined to the objection, so the set him aside; and in the debate of it the Chief Justic case. A sailor sues for wages, and the question tu the loss of the ship: no sailor who has wages due, witness as to the salvage of the ship, because he is in the event of that question.

Sailor no witness in action by another for wages, where the question turns upon the loss of the ship.

Anonymous.

Coram Pratt *C. J. at* Guildhall.

If the first contract with warranty be broke off, the warranty will not extend to a subsequent sale.

THE defendant came to the plaintiff, who was cutler, to sell him a second-hand sword: and warranting it to be a silver hilt, the plaintiff offered him and a half for it; the defendant refused to take the m thereupon went to several other sword-cutlers, but r ing with any that would give so much as the plaintiff, back to him, and told him he should have it for the

of the hilt's being silver, when in fact it was brass: but not being able to prove a warranty upon the second bargain, he was nonsuit: the Chief Justice being of opinion, that the warranty upon the bidding a guinea and half would not extend to this sale, which was a new and a different contract at a different time. Also he seemed to be of opinion, that the gripe being silver, the plaintiff should have declared specially on a warranty of the part of the hilt only, and have said that that part was brass.

Smith *versus* Potter. B. R.

IN a *qui tam* on 5 *Eliz.* for exercising a trade without an apprenticeship, *Strange* moved to stay the proceedings, because the nominal plaintiff had released, and the fact was laid at *Cambridge*, whereas the jurisdiction of *B. R.* is at last settled to be restrained by the 21 *Jac.* 1. *c.* 4. to actions arising in the county where *B. R.* sits, so that if they were to go on to trial, the plaintiff could have no effect of his suit. And of this opinion was the court, and they made a rule that proceedings should be stayed.

Proceedings in a popular action stayed, *quia* brought in *B. R.* and the fact arose at Cambridge. Salk. 373.

Moore *versus* Warren, coram Pratt, } *at* Guildhall.
Holme *versus* Barry, coram King, }

THE defendant in each of these actions at two of the clock in the afternoon gave the plaintiffs goldsmiths notes in payment, which were tendered the next morning at nine, when the goldsmiths had a quarter of an hour before stopt payment. The Chief Justices directed the juries, that the loss should fall on the defendants, there being no laches in the plaintiffs, who had demanded their money as soon as was usual in the course of dealing, and that the keeping the notes till the next morning could not be construed a giving new credit to the goldsmiths. And both juries found accordingly. And afterwards between

If the party who receives a goldsmith's bill tenders it the next day, it is not his loss if the goldsmith fails. Salk. 442. 12 Vin. Abr. 243. pl. 12, 13.

Turner et al' *verſus* Mead et al'.

Coram Pratt, *at* Guildhall.

And the common uſage in tranſacting affairs of this nature is to be chiefly regarded.

THE defendant paid the plaintiffs, who were the blade company, two goldſmiths notes at three in th noon; the plaintiffs ſervant the next morning leaves th with the goldſmiths in order to have the money ready for he came back a clearing; it being as they proved cuſtom the bank and the ſword-blade company to ſend out their r the morning, and then call for the money as their ſerv turned in the evening; and the goldſmiths upon receivi notes always cancelled them, and got the money told out the time it was uſually called for. The notes in this ca brought early in the morning, and received, and can and between four and five in the afternoon the ſervant t them called again for the money, when the goldſmiths l ſtopt payment: upon which the ſervant takes new notes ſame tenor and date with the cancelled ones he left in the ing. And becauſe the plaintiffs had done nothing bu was uſual, in leaving the notes inſtead of taking the when he firſt called in the morning, the Chief Juſtice d the jury to find for the plaintiffs, which they did.

Dominus Rex *verſus* Hall. Ibidem.

What confeſſion of being author of a libel is ſufficient to read it.

IN an information for a libel againſt the doctrine of th nity, the witneſs for the crown, who produced the ſwore that it was ſhewn to the defendant, who owned l the author of that book, errors of the preſs and ſome ſm riations excepted. The counſel for the defendant objecte this evidence would not intitle Mr. Attorney to read the becauſe the confeſſion was not abſolute, and therefore am to a denial that he was the author of that identical book. the Chief Juſtice allowed it to be read, ſaying he would upon the defendant to ſhew that there were material varia

Purret *versus* Weeks.

At Taunton *assizes*, coram Price, un' Baron' Scaccarii.

THE plaintiff was an exciseman, and lived in the county of *Devon*, and executed his office in several parishes in that county, and also in a parish that extended into *Somersetshire*. And the commissioners of that county, apprehending they had concurrent power with the commissioners of *Devon* to tax him for his salary, on account that he executed his office in their county, they tax him accordingly, and for want of payment distrain. For which trespass was brought; and ruled, that it well lay, for though he rides about to the publick houses in that county, yet he must be said to keep his office in the town where he lives and has his books, and there he was only taxable. Exciseman to be taxed in the county where he lives.

Leeds *versus* Power.

ERROR *tam in redditione judicii* in an ejectment in *C. B.* in *Ireland*, *quam in affirmatione ejusdem in B. R.* there. How to compel an assignment of errors on writs from *Ireland*.

The beginning of the term I moved for the common rule, that the plaintiff should assign his errors, it not being usual to take out a *scire facias* as we do on writs of error from *C. B.* When that rule was out, I moved again upon an affidavit that we could find no body concerned for the plaintiff in error, and had fixed it up in the office; that therefore we might be at liberty to sign a *non pros*, else if we should be put to send the rule over to *Ireland* to be served, the delay would be as great as in the case of a *scire facias*, and it being a writ of the plaintiff's own suing out, he must be apprized when was the due time to come in and prosecute it. Whereupon the court made a new rule, that unless errors were assigned within four days after fixing a new note up in the office, the defendant in error should be at liberty to sign a *non pros*. *Hill.* 8 *Geo.* *Huxley* v. *Burton*, in an *Irish* writ of error I had the same rules. *Hill.* 11 *Geo.* *Waters* v. *Ballantine*, I had the same rules on my motion.

Within the time errors were assigned; and on the arguing *Reeve* objected, that it is an ejectment for lands in the county of *Dublin*, and yet the trial is at the King's courts in the county of the city of *Dublin*.

Strange contra. This court will not take notice that they are distinct counties, but rather intend the city to be part of the county. That the county of the city of *Dublin* is the county in which the city of *Dublin* lies. Or if they should, yet the trial may be right, for it runs *postea die et loco infra content'*, which *locus infra contentus* may be as well the place within the county of *Dublin*, where the demise is laid to be made, as any other.

Or admitting it a trial out of the proper county, yet it is helped by the 16 & 17 *Car*. 2. *c*. 8. which is enacted in *Ireland* by 17 & 18 *Car*. 2. *c*. 12. being a trial by a jury of the proper county, for the award of the *venire* is previous to any mention of the county of the city, and commands the sheriff of the county, to summon twelve men of his county, and then the trial is had by the *juratores unde infra fit mentio*.

If this be not right, there never was a proper trial of any cause arising in the county of *Dublin*; for the King's courts sitting in the city of *Dublin*, it is there all the trials of those causes are had: just as here, where causes of *Middlesex* are tried in the same place where the King's Bench sits. We have instances in *England* of county causes being tried in cities which are counties also, as at *Worcester* where both are tried in the same place.

The court said, they must intend them distinct counties, but as to the other points they went over to be inquired into. And afterwards,

In answer to the objection made the last term, that the lands lay in the county of *Dublin*, and the trial was in the county of the city of *Dublin*; *Strange* now cited an act of Parliament made in *Ireland* 17 & 18 *Car*. 2. *c*. 20. which appoints the trial of causes arising in the county of *Dublin* to be at *nisi prius* in the same place where the King's courts sit, in the county of the city of *Dublin*. So the judgment was affirmed.

N. B. There being such an express act of Parliament, I thought it not necessary, to put it on the former foot of being a trial by a jury of the proper county, which would have been a sufficient answer: for *Pasch*. 10 *W*. 3. *B. R.* *Lady Calverly* v. *Sir Richard Leving* in covenant, the case was sent into the county palatine of *Chester*, on a local plea of a matter arising in the county of the city of *Chester*: the *mittimus* to the C. J. was, to award a *venire* to the sheriff of the county of *Chester*, which was done accordingly; and after verdict *pro quer'* moved by Sir *Barth. Shower* in arrest of judgment, that this is a mis-trial, not aided by the statute of jeofails; being a trial in a wrong county: but the court held it was aided: and that is a stronger case than this, where it appears the trial was by a jury of the proper county, as it was not in that case; and in delivering the resolution of the court *Holt* C. J. cited *Chew* v. *Brigs* in *B. R.* where he said it had been so held likewise, and so is 1 *Saund*. 246. *Craft* v. *Boite*.

Carth. 448.

Easter

Easter Term

7 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Justice.*

Sir Littleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Justices.*
Sir John Fortescue Aland, *Knt.*

Sir Robert Raymond, *Knt. Attorney General.*

Sir Philip Yorke, *Knt. Solicitor General.*

Myer *versus* Arthur.

THE plaintiff recovered judgment against the principal, and took out a *capias ad satisfaciendum*, and had a *non est inventus* returned: of this judgment error is brought, and two days after the plaintiff sues out a *scire facias* against the bail, who now moved to stay the proceedings upon the *scire facias*, as is done in cases where, pending error, the plaintiff brings an action of debt upon the judgment; insisting that it was more reasonable in this case, because otherwise the bail might lose the advantage of discharging themselves, by a surrender of the principal; which they can do at any time before the return of the second *scire facias*. And the court thought it reasonable, that the proceedings should be stayed; on the bail's consenting, that if the judgment be affirmed, they would surrender the principal, or give judgment on the *scire facias*.

Proceedings against bail stayed pending error by the principal.

Trin. 10 *Geo.* *Tucker* v. *Waller*, the same rule upon my motion.

See 8 Mod. 130. S. C.

See post 443. 2 Stra. 871, 872, 1270. 1 Bur. Rep. 340.

Cutler *versus* Goodwin.

Where the plaintiff releases part of the damages, he need not release any of the costs given by the jury.

ERROR of a judgment in *C. B.* in case upon several promises; on the inquiry damages are given separately, *et pro missis et custagiis ad viginti solidos*, and then the plaintiff releases the damages as to two of the counts, and has judgment for the residue with costs *de incremento*.

Branthwayte Serjeant objected, that the 20*s.* costs given by the jury went to the whole, whereas by the release the plaintiff confesses he has a cause of action but as to part. *Hob.* 168. *Sed per curiam*, All the precedents are so, the jury give the same costs in all cases, and if the defendant is put to any particular expence as to the bad count, the court can make him an allowance in the costs they give *de incremento*. Judgment affirmed.

Bayly *versus* Raby et al'.

The court cannot join declarations against separate persons.

FAZAKERLEY moved, that four several declarations in trespass against four different persons might be put into one, on an affidavit that the trespass, if any, was committed by all jointly. *Sed per curiam*, We never went so far as the case of different persons, but only where the declarations are between the same parties. The plaintiff may have the benefit of the other's evidence in his action against either, but this will be to deprive him of that.

Noaks *versus* Watts.

How pauper shall be punished for not going on to trial. Fortesc. 319.

PER curiam, It is settled in *C. B.* and we rule it so here, that a *pauper* shall not pay costs for not going on to trial, as other plaintiffs do. But if the costs are taxed, we will prevent his being vexatious, by obliging him to pay them, before he shall try the cause.

Dominus Rex *versus* Revel.

You are a rogue and a liar, spoke of a justice of peace, indictable. 2 St.. 1157. m Comb. 46, 65, 66.

INdictment against the defendant for saying of Sir *Edward Lawrence* a justice of peace, in the execution of his office, You are a rogue and a liar. And *Wearg* moved after verdict *pro Rege*, in arrest of judgment, that though the justice might have committed him for the contempt, yet the words are not indictable,

.dictable, fince it is not to be prefumed they would provoke juftice of peace to a breach of the peace, which is the reafon hy indictments have been held to lie for words. *Sed per cu-am.* The allowing he might be committed, fhews they were idictable. It is true the juftice may make himfelf judge, and unifh him immediately; but ftill if he thinks proper to proceed lefs fummarily by way of indictment, he may: the true iftinction is, that where the words are fpoke in the prefence f the juftice, there he may commit; but where it is behind is back, the party can be only indicted for a breach of the eace. Cafes cited, *Salk.* 698. 3 *Mod.* 139. 2 *Sho.* 207. *Roll. Rep.* 79. *Regina* v. *Langley*, *Soley*, *Nuns and Legaffeck.* Judgment *pro Rege.*

Sanderfon *verfus* Clagget.

LIBEL in the fpiritual court by the archdeacon for procurations; the defendant, who was curate, fuggefts that they ave never been paid, and that the church for which they are emanded is a rectory impropriate without a vicarage endowed. nd having obtained a rule to fhew caufe, why there fhould ot go a prohibition; Mr. *Williams* for the archdeacon produced an affidavit, that 6*s.* 8*d.* had been conftantly paid every ear, and cited *Davis* 6. where it is faid, that the vifitor has e fame right to procurations, as the parfon has to tithes; r as one inftructs the laity, fo the other inftructs the parfon to the points of his duty; and that a clergyman can no ore prefcribe not to pay procurations, than a layman can prefcribe in a *non decimando* for tithes. *Et per curiam*, That is ertainly fo; of common right procurations are due to the rdinary or archdeacon, and here the ordinary fuffering the rchdeacon to fue for them before him, we muft take it they elong in this cafe to the archdeacon; which is made more eafonable by coupling it with the evidence of payment. Formerly the vifitor demanded a proportion of meat and drink for is refrefhment, when he came abroad to do his duty, and examine the ftate of the church; afterwards thefe were turned into annual payments of a certain fum, which is called a procuration, being fo much given to the vifitor *ad procurandum bum et potum.* Though there be no vicar endowed, yet the eafon for thefe payments continues, for the impropriator is bliged to find a curate, and that curate will have as much inftruction from the archdeacon, as if he was rector of the parifh, a vicar endowed.

Suit lies in the fpiritual court for procurations. 1 P. Will. Rep. 657. See 2 Gibf. Cod. 1016, 1017.

And as this is a mere ecclefiaftical right, the fuit is proply inftituted before the ordinary. It was never known, that action was brought for thefe procurations, nor in the cafe tithes are there any inftances before the ftatute of *Edw.* 6.

 It

It was objected, that the libel runs, That time out of mind the archdeacon had this right, and yet it appears the archdeaconry was made within time of memory, and this is to let the fpiritual court try a prefcription. *Sed per curiam*, We all know what they mean by the phrafe *time out of mind*, which with them goes no farther back than fifty or fixty years. But if it were a new archdeaconry, why is it not like a new rectory, where tithes are due as before for all the lands within the diftrict. Here the demand is fpiritual, and fo are the perfons, who are bound by the canon law; which being the rule of thefe payments, we are of opinion, that the fuit below was well inftituted, and therefore there ought to be no prohibition.

It was formerly denied in Chancery by the Mafter of the Rolls, on debate, and time to advife.

Hillier *verfus* Plympton.

Hil. 7 Geo. rot. 46.

Departure

He that pleads *exoneravit*, muft fhew how.

ACTION upon the cafe upon feveral promifes; the defendant pleads infancy, the plaintiff replies, it was for neceffaries, and the defendant rejoins an account ftated, *quidem fuperinde praed' querens exoneravit* the defendant. And on demurrer judgment was given for the plaintiff, becaufe the rejoinder was a departure from the plea; or if not, yet *exoneravit* generally will not do, for the party muft fhew how he was difcharged.

Onflow *verfus* Orchard.

Where the defendants confefs the trefpafs, the damages cannot be fevered.

TRESPASS againft two, and judgment by default, and feparate damages, 20 *l.* as to one, and 1 *d.* as to the other; and ftayed till further motion, on the authority of *Heydon's* cafe, that the damages cannot be fevered, where the trefpafs is confeffed. *Trin. fequin'* the judgment was arrefted. 11 *Co.* 5.

The Mayor of Northampton's cafe.

Libel.

HE fent Lord *Halifax* a licence to keep a publick houfe, which the court faid was a libel in the cafe of a perfon of his quality, and granted an information for it.

Anonymous.

Anonymous.

PER curiam, If a man efcapes, and returns again, and after commits a fecond efcape, he cannot be taken up for the firft efcape, it being purged by his return.

Efcape purged by return.

Dominus Rex *verfus* Inhabitantes de Iflip in com' Oxon.

UPON a fpecial order of feffions, the cafe was ftated for the opinion of the court. That *Henry Wilfon* was regularly hired for a year by *Samuel Jones* into the parifh of *Iflip*; that during the year he was fick for fix days, and incapable of doing any fervice; that afterwards he went without leave of his mafter to fee his mother, and ftaid away four days; and that three days before his year was up he afked leave of his mafter to go to a ftatute fair, to be hired; which the mafter refufed, but the fervant perfifting he muft go; the mafter replied, "I am refolved you fhall gain no fettlement in this parifh; "and therefore if you will go, it fhall be for good and all." "No," fays the other, "I will ferve out the year;" and thereupon he went, and never returned during the laft three days; and when he came to be paid, the mafter deducted for the time he was fick, and when he went to fee his mother; which deductions the fervant agreed to; and the mafter at the fame time abated 6*d*. for the laft three days; which the fervant refufed to allow, but the mafter refufing to pay it, the fervant took the reft of his wages. And whether thefe interruptions of the fervice fhould defeat the fettlement in *Iflip*, was the queftion: and the feffions adjudged it a fettlement.

Sicknefs or abfence of fervant for part of the time does not prevent the fettlement.
Fortefc. Rep. 205.
Caf. of Set. and Rem. 97. pl. 129.
Foley 262.

It was argued largely by Mr. *Hawkins*, who moved to quafh the order; and he cited the cafe *between the parifhes of Fawlet and Bernham*, *Mich.* 1 *Geo.* where the mafter and fervant parted by confent three weeks before the end of the year, and it was held no fettlement.

And now *Pratt* C. J. delivered the opinion of the court.

In this cafe here is no doubt but that there was a compleat and perfect hiring for a year. The only queftion is, whether there has been fuch a fervice in purfuance of it, as will give a fettlement to the party. Three objections have been made at the bar, which it will be proper to take notice of.

 1. That

1. That the fervant being fick for fix days, and incapable of ferving, can never gain a fettlement, which is to be acquired only by a fervice for a year: but here fay they, he did not ferve for fix days, and fo there wants fo much of a fervice for a year. This was lightly touched upon at the bar; and furely there is little in it: a fervant that lies thus under the vifitation of the hand of God, which befals him not through his own default, is and muft be taken to be all the while in the fervice of his mafter: and if this exception was to be allowed, it might prevent all the fettlements in the kingdom. It is not to be prefumed, that the fervant is lefs able to provide for himfelf at the year's end, becaufe he has had a flight indifpofition during the year: and that prefumption of an ability is the foundation of making it a fettlement.

Burr. Settl. Caf. p. 494. pl. 158.

2. It was objected that his going to fee his mother without leave, was a defertion of the fervice; and the time he ftaid away takes fo much off from a compleat fervice for a year. As to that, we are all of opinion, that it will not prevent the fettlement: it was never the intent of the ftatute, that if a fervant happened to ftay out a night or two, it fhould avoid the fettlement. But here the mafter taking him again, has difpenfed with his non-attendance: fo there is nothing in that objection.

3. The third (and indeed the moft confiderable) objection was, that the going away three days before the year was up, and never returning again during the year, is a forfeiture of the fettlement.

Now though that would *prima facie* be a good objection, yet as this cafe is circumftanced, we are of opinion it cannot prevail. Confider how the cafe ftands, with regard to the fervant. He knew his mafter defigned to part with him at the year's end: and therefore it was high time for him to look out for another place. To this end, he applies, in a very proper manner, for leave to go to the ftatute fair, which is a place where in all likelihood he might provide himfelf, and not be obliged to lie idle all the year, it being ufual for people in the country to go thither to hire their fervants; the mafter, like an unreafonable man, refufes fo reafonable a requeft, coupling it with a declaration, that the fervant fhould gain no fettlement with him; which is a badge of fraud on the fide of the mafter that ought not to prevail. As therefore the requeft was reafonable, and upon a juft ground, on the fide of the fervant; and the refufal unreafonable, on the fide of the mafter; we think the fervant's going afterwards without leave, is no forfeiture of his former fervice; efpecially if we take in the declaration the fervant made at that time, "that he would ferve out the year," and his refufal afterwards to allow the mafter 6*d*.

S. P. accord. Burr. Settl. Caf. 433. pl. 139. 494. pl. 158.

for the laft three days, which plainly fhew that the con- was not diffolved before the end of the year, as was gly infifted on at the bar.

hefe are all the exceptions that were taken to this order; are all of opinion, that they are not fufficient to overthrow ettlement, and confequently the feffions have done right in ing him to *Iflip*, and the order muft be confirmed. 2 Burr. Rep. 788.

Woodford *verfus* Eades et al'.

N a contract for ftock between the plaintiff and *J. S.* they each depofit 200*l.* in the hands of the defendant, *J. S.* not performing his agreement, the plaintiff fues for depofit, and had judgment on demurrer, and took out a writ quiry, and proved his cafe; but the jury, on a notion that defendant could not pay out the money without confent oth parties, gave 1*d.* damages; which was now fet afide, court faying, that the rule of not fetting afide verdicts for fmallnefs of the damages did not extend to this cafe, where jury miftook in point of law; and the Chief Juftice faid he w no reafon why the court fhould not interpofe in the other .

Court fet afide verdict for fmallnefs of damages. *Vide* Salk. 647.

Clare *verfus* Froft.

RESPASS for cutting down the plaintiff's tree. *Strange* moved, and had leave to plead double; *viz.* that the de- dant was leffee of an houfe and the clofe where the tree d, and having liberty to cut down for repairs, he felled it that account; and fecondly, That *J. S.* was owner of an ient mill, to which there was a watercourfe through the und of the plaintiff, and fo prefcribe for a right to enter l cleanfe the watercourfe, and that the tree hung over, and root fpread fo into the ftream, that it ftopped the water, d fo juftify the cutting down.

Two juftifications allowed to be pleaded.

Edwards *verfus* Blunt.

ER curiam, after judgment on demurrer, the defendant fhall not come to arreft the judgment on return of the in- ry, for an exception that might have been taken on argu- the demurrer. The parties cannot be faid to come as *ci cur'*, nor fhall any body tell us, that the judgment we e on mature deliberation is wrong; it is otherwife indeed he cafe of judgment by default, for that is not given in fo folemn

After judgment on demurrer, no motion to arreft judgment.

folemn a manner; or if the fault arifes on the writ of inquiry or verdict, for there the party could not allege it before. [illegible] v. *Godfrey*, *Mich.* 4 *Geo.* 2.

Seagood *verfus* Neale. In Canc.

What writing evidence of agreement within the ftatute of *frauds*. Atk. Rep. 12. pl. 5. S. P. Ch. Prec. 560.

S Agreed to fell an eftate in land to *O.* and wrote to his agent to deliver the title deeds to *O.* he having agreed to difpofe of it to him. Afterwards *S.* fold this eftate to *D.* who had notice of this tranfaction: *O.* brought a bill againft *S.* and *D.* infifting that the letter brought the cafe out of the ftatute of frauds and perjuries. But Lord Chancellor held it did not, becaufe the agreement does not appear in it.

Cumber *verfus* Wane.

Trin. 5 Geo. rot. 173.

Giving a note for 5 *l.* cannot be pleaded as a fatisfaction for 15 *l.*

ERROR e C. B. in an *indebitatus affumpfit* for 15 *l.* The defendant pleads, that he gave the plaintiff a promiffory note for 5 *l.* in fatisfaction, and that the plaintiff received it in fatisfaction. The plaintiff put in an immaterial replication, to which the defendant demurred. And after judgment for the plaintiff, it was objected on error, that the plea was ill, it appearing that the note for 5 *l.* could not be a fatisfaction for 15 *l.* and that where one contract is to be pleaded in fatisfaction of another, it ought to be a contract of an higher nature. *Hob.* 68. 2 *Keb.* 804. One bond cannot be pleaded in fatisfaction of another. 1 *Mod.* 225. 2 *Keb.* 851. Even the actual payment of 5 *l.* would not do, becaufe it is a lefs fum. 5 *Co.* 117. 1 *Leon.* 19. Much lefs fhall a note payable at a future day.

Econtra. It was argued, that the plaintiff's demand confifting only in damages, it was for his benefit to have it reduced to a certainty, and to have the fecurity for it made negotiable. A ftated account may be pleaded in bar of an action of covenant. 4 *Mod.* 43. 1 *Mod.* 261. 1 *Roll. Abr.* 122. Formerly indeed executory promifes were not held a fatisfaction, but the contrary has been fince adjudged. *Raym.* 450. *Salk.* 76. And now it is held that an award before performance is a bar of the former action.

Et per Pratt C. J. (on confideration) We are all of opinion, that the plea is not good, and therefore the judgment muft be affirmed: as the plaintiff had a good caufe of action, it can only be extinguifhed by a fatisfaction he agrees to accept; and it

is not his agreement alone that is sufficient, but it must ap- ar to the court to be a reasonable satisfaction; or at least the ntrary must not appear, as it does in this case. If 5 *l.* be s is admitted) no satisfaction for 15 *l.* why is a simple con- ct to pay 5 *l.* a satisfaction for another simple contract of ree times the value? In the case of a bond, another has ver been allowed to be pleaded in satisfaction, without a bet- ring of the plaintiff's case, as by shortning the time of pay- ent. Nay in all instances the bettering his case is not suffi- ent, for a bond with sureties is better than a single bond, and t that will not be a satisfaction. 1 *Brownl.* 47, 71. 2 *Roll.* Ar. 470. The judgment therefore must be affirmed.

Then it was alleged, that since the time which the court ok to advise, the defendant in error was dead; and there- re they prayed, that they might enter the judgment *nunc pro* *nc*, as was done in the case of *Baller* v. *Delander*, *Trin.* 1 *Geo.* *B. R.* which was ordered accordingly.

Judgment entered *nunc pro tunc* where the party died pending a *cur' advisare vult.* Barnes 186.

. C. P. 242. Rep. and Cas. Pract. C. P. 143, 144. 1 Bur. Rep. 414. Black. Rep. 95.

Right *versus* Hamond.

N ejectment, a case was made at *Kent* assizes; that *Thomas* *Came*, being tenant for life of the lands in question, remain- r to his wife for life, remainder to his own right heirs, *October* 1673. made his will in these words: "*Item*, my lands by *Woolwich* my wife is to enjoy for her life, after her decease of right it goeth to my daughter *Elizabeth* for ever, provided she hath heirs; if my said daughter *Elizabeth* should die before her mother, *or* without heirs, and my said wife *Mary* should marry again and have an heir male, I bequeath him all my right to that estate, not thinking I can sufficiently reward her love; if my said wife marrieth again, and fails of heir male, after her decease and my daughter, she failing of heirs, I bequeath 50 *l. per ann.* of that estate to my brother *Joseph Came*, and to his heirs for ever." And then tributed the rest to other persons.

Construction of a devise. Com. Rep. 232. 2 Eq. Cas. Abr. 338. pl. 11. 8 Vin. Abr. 110. pl. 32.

The devisor died, and the wife married again, and had issue *mas Hamond* the defendant, and died. Then *Elizabeth* the ughter died without issue. And upon her death the lessors the plaintiff claim the estate as right heirs of the devisor, l the defendant claims under the devise to the heir male of devisor's wife by a second husband.

Reeve pro quer' argued, that the devise to the defendant was l, being of a fee upon a fee. 19 *H.* VIII. 8. *Cro. Car.* 57. when it was to go to his daughter and her heirs, there could

be

be no limitation over. Indeed 3 *Lev.* 70. ſays it is but a tail; but the difference is, where the limitation is to one who can be heir to the daughter, there it is a fee-tail, becauſe the deviſor muſt know the remainder would be void if the firſt was a fee-ſimple, becauſe the remainder-man would claim as heir to the daughter; but here the defendant is a ſtranger, and cannot be heir to the daughter.

Then it is objected, that the words *ſhe failing of heirs*, ſhew what heirs were meant, and there is a limitation to the uncle, who may be heir to the daughter. But why may not that be conſtrued to be a rent-charge of 50*l.* *per ann.* to the brother, and then it can have no influence to turn the daughter's eſtate into a tail; beſides, this is an independent clauſe, and therefore not to controul the conſtruction of the former, according to the caſe in *Dy.* 124.

The defendant cannot take by way of executory deviſe, becauſe it is a contingency on a dying without heir, which is too remote.

But if the deviſe was good, yet the contingencies have never happened. The words are, *if my daughter dies before her mother, or without heirs*: now the words are not to be taken ſtrictly, for then perhaps the iſſue of the daughter may be barred by her death before the mother; but the natural way is to read it in the copulative, as we have many inſtances. 1 *Ven.* 62. 1 *Leon.* 70. *Pollex.* 645. *Plow.* 286, 289. So that taking it that way, then the mother died firſt, and conſequently the defendant, who is to claim on the daughter's dying before the mother, can have no title.

Cheſhyre Serjeant *contra.* I admit, if the firſt words ſtood alone, they would carry a fee to the daughter. But it would be endleſs to cite caſes, where the fulleſt words have been controuled by what has come after, ſo as to make that a deviſe in tail, which otherwiſe would paſs a fee. 1 *Roll. Abr.* 836.

I do not contend, that this is an executory deviſe; it muſt be a contingent remainder. 2 *Saund.* 88. 2 *Cro.* 416. 1 *Saund.* 142. 3 *Co.* 31.

I ſee no reaſon to alter the word *or*; if you do, why may not we read it, *if* ſhe dies before her mother, *or after* without heirs.

Adjournatur. And afterwards *Pratt* C. J. delivered the reſolution of the court.

We

We are of opinion, that the first part of the will is no devise, the testator only taking notice how the estate was settled before, that if he made no will his wife would have it for her life, and after her decease of right it would go to his daughter *Elizabeth* for ever. The devise therefore to the defendant can be only considered as a contingent remainder, or an executory devise: as an executory devise it cannot be good, for the contingency is too remote; and it is not like the case of *Lloyd* v. *Cary*, where the contingency was so very near the compass of a life, whereas here it is limited on the wife's having no issue male by a second husband, and the daughter failing of heirs. Com. Rep. 20.

As a contingent remainder it will not do for want of a particular estate, taking the first part of the will to be only a declaration how his estate was settled, and not as a devise to the daughter.

Besides, it appears the contingency never happened, for the daughter did not die before the mother, consequently the lessors of the plaintiff, who are both heirs to the daughter and heirs to the devisor, must enter, and therefore the plaintiff must have judgment.

Crompton *versus* Ward.

Intr. de Hill. 4 Geo. rot. 379.

Qu. Whether a rescue upon a *habeas corpus* between judgment and execution be pleadable to an action of escape?

IN case for the escape of *Mary Oglethorpe*, the declaration set forth, that *Mich.* 2 *Geo.* in *C. B.* the plaintiff recovered judgment against her for 232 *l.* which coming into *B. R.* by writ of error, the writ was *non pros* and execution awarded, which judgment is still in force: That 12 *June* 2 *Geo.* the said *Oglethorpe* surrendered herself to the *Fleet* in discharge of her bail, from whence she was removed by *habeas corpus* to *Newgate una cum die et causa*, &c. where the plaintiff intended to charge her in execution, but the defendants, sheriff of *Middlesex*, voluntarily permitted her to escape. The defendants confess the said *Oglethorpe* in their custody, *prout*, &c. but say that 20 *Junii* a *habeas corpus* was delivered to them, requiring them to bring her to the Chief Justice's chamber, upon which they made a warrant to their bailiff commanding him to carry her and bring her safe back again, by virtue of which he took her out of *Newgate*, and in carrying her along she was rescued. The plaintiff demurs. And *Mich.* 5 *Geo.* *Yorke pro quer'* took three exceptions to the manner of pleading.

1. It is improperly pleaded: they should not have set forth the fact, but the operation of law resulting from that fact; therefore

therefore pleading the rescue from the bailiff is wrong; it ought to have been as from the sheriff, for the law takes no notice of a bailiff or his acts. In *Cooke*'s case, *Hil.* 2 *Geo.* a rescue was returned on a bill of *Middlesex* in this form: that a *capias ad satisfaciendum* issued to the sheriff, who thereupon took the debtor, and the rescue was made of the prisoner under that arrest: exception was taken, that this return was only argumentative, because an escape of one in custody of the sheriff is an escape for all suits wherein he had process. The return indeed was held good, it being *veritas facti*, but the court held it would have been otherwise in pleading. 2 *Saund.* 97. If one jointenant pleads that the other *concessit* to him, it is ill; for it should have been pleaded as a release, that being the only proper conveyance between jointenants. 2 *Vent.* 149, 260, 266. 3 *Lev.* 290. That was pleaded as a grant, which could only enure as a covenant to stand seised, and the plea was held ill, for it ought to have been pleaded according to the effect of in law. *Salk.* 8, 274.

2. The defendants ought to have averred, that she was not afterwards found *in balliva sua*. *Dalt.* 215, 216. *Officina Brevium* 203, 204, 217, 226.

3. The *habeas corpus* requires her to be brought *sub salvo securo conductu*, but the defendants have not shewn that they complied with this direction; and this they ought to do, when they plead a rescue.

As to the principal point, whether the rescue here pleaded a sufficient excuse; I must observe, that such returns have never been favoured, because there may be fraud and combination impossible to be discovered, and they infer a reflection upon the King, by supposing an unlawful force, as appears by *Westm.* *c.* 39. which recites, that the sheriffs *multotiens falsum dant responsum, mandando quod non potuerunt exequi praeceptum regis propter resistentiam:* and concludes, *Caveant vicecomites de caetero, quia hujusmodi responsio redundat in dedecus domini regis et coronae sui* A return of a rescue may discharge the sheriff against the King but not against the party. Formerly such a return of a rescue upon *mesne* process was held not pleadable, because the sheriff might take sufficient power of the county. *Cro. Eliz.* But since in the case of *May* v. *Proby*, *Cro. Jac.* 419. 3 198. *Moor* 852. 1 *Roll. Abr.* 807. it has been resolved, the arrest being on *mesne* process, and not upon executio[n] sheriff is not bound to take the *posse comitatus*, and th[e] rescous is a good return: but if the prisoner had been onc[e in] gaol, the sheriff ought to keep him at his peril, and rescou[s no] excuse, for he is to take care that his prison be strong to keep the prisoners. And upon process of executio[n] return is no excuse against the King or the party, for t

ess being once executed, the party can have no other: from his case I draw two inferences, 1. That when the prisoner is once in gaol, a rescue then will be no excuse to the sheriff. Roll. Abr. 807. pl. 3. 33 H. 6. 1. 4 Co. 84. a. is a much stronger case than the present; for there it is held that if rebel subjects break the prison, whereby the prisoners escape; this is no excuse; though it is otherwise where it is done by foreign enemies. In 33 Hen. 6. 1. the case was adjourned, but in 16 Ed. 3. it is resolved by all the Judges; and the marshal of B. R. was forced to get an act of Parliament. 2. The other inference is, that wherever the sheriff may raise the posse, he is not excusable for a rescous, because no power is by intendment able to resist the sheriff and his posse. 8 Hen. 4. 19. The prisoner here is to be taken to be in actual custody. It cannot be intended the habeas corpus was sued out at the instance of the plaintiff, and the sheriff might have raised the posse; the very words of the writ suppose it, sub salvo et secura conductu. Since it appears therefore, that the sheriff is liable for the rescue of one in execution, and for a rescue out of the prison where the custody is on mesne process only, because in those cases he may raise the posse, I can see no reason to distinguish this case from those, and why he may not have the posse in one as well as in the other.

Bootle contra. As to the first objection, we may plead either according to the truth of the fact, or the operation of the law upon that fact, and either way is good. *Palm.* 532. 2. We have confessed and avoided the escape, and the cases cited are of returns, where it may be necessary to say the party was not afterwards to be found in his bailiwick; because according to the latter resolutions, 1 *Vent.* 269. which denies the sheriff of *Essex's* case in *Hob.* 202. the prisoner may be re-taken, and therefore the return must answer every possibility, which need not be done in pleading. The third objection depends upon the principal point, as to which I must observe, that it appears *Oglethorpe* was not in execution, for which reason case is brought, because the 1 *Rich.* 2. *c.* 12. gives debt only for the escape of one in execution. 11 *Hen.* 4. 11. *A.* wounds *B.* and being in the custody of the constable escapes, and then *B.* dies; the constable is not answerable as for the escape of a felon. *Salk.* 614. 2 *Mod. Cas.* 158. At this day a rescue upon *mesne* process is a good excuse, though the former opinions were otherwise. 3 *Lev.* 46. 2 *Lev.* 144. and 2 *Cro.* 419. *May* v. *Proby*. There is a great difference between prisoners at large, and those in actual custody; the latter by *Westm.* 2. *c.* 11. may be kept in irons, but that extends only to such as are within the walls of the prison: one in custody out of the prison is not required to have so strict a guard, and therefore, though a rescue out of the goal of one in upon *mesne* process makes the sheriff liable, yet he is not so for the rescue of

of a person not carried to gaol. On a *habeas corpus* the sheriff may go out of the way with the prisoner, provided he has him ready at the return of the writ. 3 *Co.* 44. *a.* The sheriff is obliged to bring out the party in obedience to the King's writ, and he is not compellable to have a stricter guard than for a person arrested on *mesne* process: a common *capias* has the words *salvo custodias* as well as the *habeas corpus*, so no inference can be drawn on the wording of the writ. The reason why the sheriff shall raise the *posse* in case of execution doth not hold in this case; for the party doth not lose his debt, nor even his process, for there may be a re-caption: the statute of *Marleberge*, *c.* 21. and *Westm.* 1. *c.* 17. *Westm.* 2. *c.* 39. are but in affirmance of the common law. 2 *Inst.* 454. For the sheriff might have had the *posse* before. But though he may, yet he is not obliged to raise the *posse* upon every occasion, for it is to be presumed men will act according to law, and the contrary is never supposed. 10 *H.* 7. 26. The sheriff in this case might plead a re-caption. *Godb.* 177. And as on *habeas corpus* he may let the prisoner go out of the way, it shews he is only considered as a person in custody upon *mesne* process: escapes being so penal, the judges have always made a favourable construction for the officers. 3 *Co.* 44. *a.*

Yorke replied. This is more than a custody on *mesne* process. The demand *transit in rem judicatam*; and if the sheriff is not liable, it will be very easy to bring a *habeas corpus* for no other end, but to let the prisoner escape.

Chief Justice. Here the fact pleaded is true, that she was in the custody of the bailiff, and rescued from him; and though this amounts in law to the custody of the sheriff, yet it differs from the cases of grants, for there the fact was not true: it was not a grant but a release, and a covenant to stand seised, but here the fact is true, and properly pleaded. 2. The defendants have confessed and avoided, and therefore it lay upon the plaintiff to shew a re-caption in his replication. The third objection likewise has nothing in it, for the words of a common *capias* are as strong.

As to the principal point, I cannot see how this case is distinguished from a custody on *mesne* process, where a rescue is pleadable. The sheriff was obliged to bring her out, and as she was not in execution, she can only be said to be in upon *mesne* process. *Powys* Justice *accord.*

Eyre Justice inclined the rescue was a sufficient excuse, and well pleaded.

Fortescue

Fortescue Justice *accord.* as to the first objection. As to the ond I think the plea should have gone on, and said she was found afterwards; as this stands, there may be an intendnt that she was. As to the third, it appears she was carried one single officer, which is certainly a neglect. This is a sort middle process after the plaintiff has run a long race; and ugh the crown may command the sheriff to bring out his oner, yet that is without prejudice to the party: she ought be conveyed as securely as she is kept, and the sheriff here y have his remedy against the rescuers. He might before he ught her out have insisted on money to pay a guard.

Hil. 7 *Geo.* it was argued a second time, by *Wearg pro* *.* The question is, whether after judgment and before any rge in execution, a rescue on the party's being brought out a *habeas corpus* be a good excuse for the sheriff in an action escape.

To prove it no excuse I shall consider, 1. What are the unds of this action, taking it as entirely new. 2. Compare with the resolutions already in the books. 3. The objecns that have been or may be made.

1. To consider the foundation of such an action; and that the damage which the plaintiff has sustained by the neglect the defendant, which he might have prevented by the use of ose means that he had in his power; for the law supposes e *posse* to be a sufficient defence against a rescue, and that no rce is able to resist the sheriff and his *posse*. Here is not the t of God, as fire; or any foreign force, as the case of enemies, hich I admit are excuses for the sheriff. 33 *Hen.* 6. 1. 16 *H.* 4. 3. 4 *Co.* 84. 1 *Roll. Abr.* 808. The sheriff may if pleases raise the *posse* in execution of any process whatsoever. *Inst.* 193. 3 *Hen.* 7. 1. *Dalt. Sher. cap.* 20. *p.* 104. *cap.* , *p.* 354, 5. The plea admits the neglect, and the officer s a fee. 3 *Bulst.* 212. *Cro. Eliz.* 873. 1 *Vent.* 268. *inch* 90. 21 *Ed.* 3. 45. *b.*

2. The cases in the books. I would compare this with the se of a rescue of one taken upon *mesne* process before he is rried to gaol. In Queen *Elizabeth*'s time this question was termined against the sheriff. 3 *Cro.* 868. *Noy* 40. But I mit it has since been resolved otherwise. 3 *Bulst* 198. And w it is held, that the sheriff shall not be answerable, 2 *Cro.* 19. 1 *Roll. Abr.* 807. *D.* 1. 1 *Lev.* 144. 3 *Lev.* 46.

But taking the law according to the latter reſolutions, I ſhall ſhew, that the reaſons they go upon do not affect this caſe.

1. In the caſe of *meſne* proceſs though the ſheriff may, yet he is not bound to raiſe the *poſſe*. *Dalt.* 154. But in this caſe, where the priſoner is conveyed by proceſs after judgment, he ought to take the ſame caution, as if he was upon a *capias ad ſatisfaciendum*, nay a greater if he obſerves the words of the *habeas corpus*, which require him to convey the priſoner *ſub ſalvo et ſecuro conductu*. Beſides this is a proceſs not ſo eaſy to be renewed as a *capias ad ſatisfaciendum* or *meſne* proceſs. *Cro. Car.* 240, 255.

2. Another reaſon why reſcue on *meſne* proceſs is an excuſe is, becauſe of the multiplicity of ſuch writs, which are executed at the ſame time in different parts of the county, which makes it impoſſible for the ſheriff to raiſe the *poſſe*; but this is a writ which rarely iſſues, and there is no danger of having many of them to execute at the ſame time.

In the caſe of *meſne* proceſs the plaintiff has the conduct of that, but the defendant may purchaſe the *habeas corpus*.

3. The objections are, 1. That we may have our remedy againſt the reſcuers; but will not they ſend us back again to the ſheriff? Beſides, it is a doubt whether the plaintiff has any remedy againſt the reſcuers; the ſheriff indeed has, and therefore he is not hurt by being ſubjected to our action. *Hutt* 5. 2 *Cro.* 419. *Cro. El.* 53. The wrong is done by both the ſheriff and the reſcuers. 1 *Roll. Abr.* 698. *B.* 3.

2. Say they, why ſhould the *habeas corpus* put the ſheriff in a worſe condition, when he is obliged to bring her out in obedience to that command? But we ſay no command of the crown can excuſe him as to the ſubject. *Dyer* 296. *b.* 297. *a.* 1 *Rol. Abr.* 808.

3. It is objected, that this will be a hard caſe upon the ſheriff, who may be ruined by combinations between the plaintiff and defendant. But has not the law furniſhed him with the means to prevent any thing of that nature, by inveſting him with a power to raiſe the *poſſe*?

Upon the whole it appears here has been a neglect, an interruption of the courſe of juſtice, a damage to the plaintiff, for which he ought to have redreſs.

Rarvis contra. This is a rescue of one in custody on *mesne* [cess] only, and not out of the walls of the prison: for [he was] [br]ought thence by the King's command, which the sheriff was [bou]nd to obey. And 4 *Co.* 44. it is said, that every thing is to [be] taken most favourably for the officer. In the case of a *capias* [ad] *satisfaciendum*, the reason why the sheriff was liable was, [beca]use the party could have no new writ. *Hob.* sheriff of *Essex's* [case]. Though it is otherwise resolved since, that the party him[self] may retake him. 1 *Sid.* 330. 1 *Lev.* 211. 2 *Keb.* 340. [Lev.] 109, 132. 1 *Vent.* 267. *Show.* 177. But what if [he] is rescued on *mesne* process, and cannot be re-taken; does the plaintiff lose his debt as much as in the case of an ex[ecut]ion? The reasons now given for that case, are not given [in t]he books.

This is no more than a custody on *mesne* process out of the [wal]ls of the prison; every common *capias* has the words *salvo* [custo]*dias*, so no argument can be drawn from those words in [the] *habeas corpus*. The sheriff is liable in no case for a rescue, where he was obliged to take the *posse*, which here he was [not]. If the sheriff after the party is charged in execution, [brin]gs him out on a *habeas corpus*, it is no escape if he goes out [t]he direct way. 3 *Co.* 44. *Moor* 257.

And as to the objection that the plaintiff is no party to the [sui]ng out the *habeas corpus*; is not that the case where there [are] several processes charged against the same person, and he [is r]escued when taken on one only? And though the warrant [was t]o one bailiff only, yet that is no argument of a neglect, be[cau]se that bailiff had it in his power to raise the *posse* without [sen]ding back to the sheriff.

[A]*djournatur*. And this term *Pratt* Chief Justice delivered [the] resolution of the court.

[It] was admitted at the bar, and is not now to be disputed, that on the one hand if the sheriff arrests the party by virtue [of m]*esne* process, and he is rescued as he carries him to gaol, [it w]ill be a good excuse for the sheriff. *Cro. Jac.* 419. And on [the o]ther hand, if the party be once within the walls of the prison, [thou]gh the custody be on *mesne* process only, yet a rescue from [then]ce by any but common enemies will be no excuse: if a com[pany] of rebels break the prison, and let out the prisoners, yet the [sher]iff is answerable; because the law supposes the sheriff and [the] *posse* are sufficient to resist such a force. 1 *Roll. Abr.* 811. [...]. 84. These, I say, are grounds that are not to be dis[pute]d.

 The

The case at bar is new, and differs from both these; but however, we must take it up upon the different reasons of those cases. In the case of *mesne* process the sheriff, if he meets the party against whom he has such process by accident, and is told it is the defendant, he is bound to arrest him: and then because it is not supposed that he has always the *posse* along with him, he is excused against a rescue. But in the present case there is no such danger of surprize, he has notice before, that such a day he is to bring the party out of prison, and it is his duty, and so he is directed by the writ, to provide for the sure and safe conduct of the party. Here he has not taken that caution, whereby the plaintiff, who had an interest, a sort of property in the body of the prisoner, has sustained a damage. This damage has happened by the neglect of the sheriff, and therefore he must answer it to the plaintiff in this action. Judgment *pro quer.*'

Trinity Term

7 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Justice.*
Sir Littleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Justices.*
Sir John Fortescue Aland, *Knt.*
Sir Robert Raymond, *Knt. Attorney General.*
Sir Philip Yorke, *Knt. Solicitor General.*

Dominus Rex *versus* Butcher.

EXCEPTION was taken to an order of bastardy, that it did not appear the child was born in the parish to which the relief is ordered: for it ran, *We* A. *and* B. *two Justices of the borough of* Lime Regis, *residing within the limits where the parish church is, within which parish the child was born, do*, &c. which is only an averment, that the justices resided in that parish where the child was born, but that might not be the same parish to which relief is given; and for this fault the order was quashed.

In order of bastardy it must appear the child was born in the parish to which relief is ordered. Salk. 472.

Pas. 3 *Geo.* 2. *Rex* v. *Childrens*, an order was quashed for not shewing the child was born in the parish, to which relief was ordered.

Barnard K. B. 326.

Between the Pariſhes of Eaſtwoodhey in Com' Hants and Weſtwoodhey in com' Berks.

If a ſon grown up removes with his father as part of the family, he gains a new ſettlement with the father; but if the father afterwards removes and leaves him behind, he gains no ſettlement in his laſt place.
19 Vin. Abr. 383. pl. 8.

UPON appeal from an order of two juſtices for the removal of *Robert Baker*, *Elizabeth* his wife, and *Thomas* their ſon under ſeven years, from the pariſh of *Weſtwoodhey* to the pariſh of *Eaſtwoodhey*, the ſeſſions ſtate the fact ſpecially for the opinion of the court.

That forty years ſince, *Thomas Baker*, the father of this *Robert*, was ſeiſed in fee of a freehold eſtate in the pariſh of *Hampſtead Marſhal* in the county of *Berks*, where he lived till the year 1697, and had this ſon *Robert*, who was at that time eight years old. That in 1697, the father and all his family removed to *Cheveley*, where he rented a tenement of 20*l.* *per ann.* for two years. That in 1699, he purchaſed a copyhold eſtate of 11 *l.* *per ann.* in the pariſh of *Weſtwoodhey*, whither he removed with his ſon and ſervants, and ſerved church-warden and other pariſh offices, and paid taxes till 1716, when he purchaſed a cottage of 1 *l.* 12 *s.* 6 *d.* *per ann.* in *Eaſtwoodhey*, and went and lived upon it till his death; but they ſtate it ſpecially, that *Robert* the ſon ſtaid behind in *Weſtwoodhey*, where he married a wife, and has work'd ever ſince on his own account, and that he is thirty years old. Upon the whole, the ſeſſions confirm the order of the two juſtices for his ſettlement at *Eaſtwoodhey*.

Strange moved to quaſh the order of ſeſſions, for that the ſettlement of *Robert* the ſon is either at *Hampſtead Marſhal*, where he was born, and where he lived till eight years old: *Salk.* 470. Or if it ſhould be carried ſo far, as that he gained a new ſettlement with the father, by removing with him as part of his family, according to the caſe of *Cumner* v. *Milton*, *Salk.* 528. yet that can carry him no farther than *Weſtwoodhey*, which is the laſt place to which he accompanied his father; but let the ſettlement be in either it is not material now, the only queſtion being whether here is any ſettlement in *Eaſtwoodhey*, for which there is no colour.

Mr. *Strode e contra* inſiſted, that let the ſon be of what age he will, he ſhall follow the ſettlement of the father, till he gains one by his own acquiſition; and it appearing he had never done any thing to gain a ſettlement by act of his own, either in *Hampſtead Marſhal*, *Chevely*, or *Weſtwoodhey*, then he muſt follow the ſettlement of the father as well in *Eaſtwoodhey* as in any of the reſt.

C. J. The

C. J. The queſtion is not where this man and his family are ſettled, but whether there appears a ſettlement of him in *Eaſtwoodhey*. If he had gone thither with his father as part of the family, poſſibly it might have been a ſettlement of him there, but by ſtaying behind he was divided from his father, and therefore there is no colour to make it a ſettlement in *Eaſtwoodhey*. I think his ſettlement is in *Weſtwoodhey*, which was the laſt place where he lived as part of the father's family. To which *Powys* J. agreed. *Et per Eyre* J. He is ſettled at *Weſtwoodhey*, and it is not material how that ſettlement was acquired, whether by his own act, or the act of his father. Suppoſe a maſter has two farms in two pariſhes, and he removes during the year, and leaves the ſervant behind to take care of the farm: ſhall the maſter's gaining a new ſettlement transfer the ſettlement which the ſervant gains by his ſervice? Certainly it ſhall not.

Forteſcue J. *accord'*, and the order was quaſhed.

Jeffry *verſus* Wood.

Mich. 7 Geo. rot. 264.

THE plaintiff in error aſſigned errors in law, and in fact; and on demurrer for duplicity the queſtion was, what judgment the court ſhould give; and after conſideration they ordered an entry, *quod affirmetur*, according to *Yelv*. 58.

On demurrer to aſſignment of errors the judgment is *quod affirmetur*.

Turton *verſus* Hayes.

THE plaintiff had been *non proſ'd* in a former action for want of a declaration, and now in a ſecond action Serjeant *Whitaker* moved, that the defendant might be diſcharged upon common bail, alleging it to be the practice of *C. B.* *Sed per curiam*, We know of no ſuch practice here, and think it very unreaſonable; for the plaintiff ſuffers enough by paying coſts in the firſt action, and therefore ought not to be in a worſe condition than before.

After *non proſ.* the defendant ſhall find bail to the ſecond action.

Bellew *versus* Scott.

Pas. 6 Geo. rot. 408.

In the case of an executor if a *devastavit* be returned, there needs no allegation of a conversion to their own use.
Andrews 246. S. C. S. P.

ERROR, *tam* in the award of execution in a *scire facias* [illegible] against executors upon a judgment against their testator [illegible] in *C. B.* in *Ireland*, *quam in affirmatione ejusdem in B. R.* there [illegible]

Strange pro querente in errore took several exceptions, and [illegible] *inter alia*,

First, The proceedings are against a man and his wife as [illegible] executrix, and the *devastavit* is returned in this manner, that [illegible] goods of their testator did come to their hands sufficient to pay [illegible] the debt, which they (*i. e.* the husband and wife) have wasted [illegible] and converted to their own use, which he said a *feme covert* [illegible] could not do; and cited 1 *Ven.* 12, 24, 33. where in trover it [illegible] was held ill, to say a *feme covert* converted goods to her own [illegible] use; and though this be the case of an executrix, who has [illegible] particular interest in the goods, and may dispose of them as she [illegible] pleases; yet that cannot alter the case, because the conversion [illegible] has quite extinguished that particular interest of hers, and can [illegible] enure only to the benefit of the husband. 1 *Roll. Abr.* 932 [illegible] *F.* 1 [illegible] speaks of the sheriff's returning, that the husband has [illegible] converted, and he says that in that case the execution shall be [illegible] *bonis propriis* of the husband, whereas here it is awarded against [illegible] the goods of them both. *Sed per curiam*, The precedents are [illegible] so as this in the case of a *feme* executrix. It is sufficient to say [illegible] that the wife wasted the goods, without going on to speak of [illegible] a conversion; and therefore if the expression be not proper, we [illegible] may reject the *converterunt in usum suum proprium*. In trover it is essential, but here it is not. 1 *Roll. Abr.* 930. *pl.* 9. *Cro. Car.* 519. are, that the judgment on such a return shall be *de bonis propriis* of both.

The court may award a *certiorari* before errors assigned.

Second exception. Upon the writ of error in *B. R.* before errors assigned, or diminution alleged, there goes a *certiorari*, by which all the several processes of execution are brought up and made parcel of the record; whereas the only ground for awarding it can be to verify or falsify an assignment of errors, and therefore it should not have issued before. *Sed per curiam*, The court may take notice, that the record is imperfect, and award the writ for their own satisfaction.

Videtur cur' is no essential part of the judgment.

Third exception. In all judgments it must appear, the court has fully considered of the case, and are convinced that the judg-

they give is right at the time of pronouncing it; and in .02. *Atwood* v. *Burr*, a judgment on demurrer was held ous, for want of *quia videtur cur' quod placitum minus is in lege existit.* In the case at bar it appears the judg- was affirmed before the merits of the case had been con- , for the record is, *quia videbitur*, in the future tense, l of *videtur*: so that because *it will appear* at a time to that the record is right, therefore do they before that ffirm the judgment.

per curiam, That case of *Atwood* v. *Bur* was of an inferior neither (as Mr. J. *Eyre* said) is the report of it right; that point was mentioned in *Mich.* 1 *Ann.* but the cause ill *Hil.* 4 *Ann.* when the judgment was reversed on ano- oint. *Videtur cur'* is no judgment, *Cro. El.* 145. and is d in the *ideo consideratum est.* There was a case in the quer Chamber, where the *quia videtur* was, that the de- t's plea is good, *ideo consideratum est*, that the plaintiff have ent. But the court said, that if it did not appear to be erro- they would not reverse it merely because a wrong reason ven for the judgment. The judgment was affirmed.

Robins *versus* Sayward.

7 & 8 W. 3. c. 34. See *Howel* against *Walker*, 2 Barnard. K. B. 145. Quaker no witness to ground an attachment for non-performance of an award.

R *curiam*; We cannot ground an attachment for non- erformance of an award on the affirmation of a quaker; ugh it be in a suit between party and party, yet it is a cri- prosecution within the proviso of the statute 7 & 8 *W.* 3.

Bromley *versus* Frazier.

9 & 10 W. 3. c. 15.

Indorsor of bill of exchange may be charged, without first resorting to the drawer. Post, 649. 2 Str. 1007. contr.

.SE upon a foreign bill of exchange by the indorsee against the indorsor, and on general demurrer it was ed, that they had not shewn a demand upon the drawer, ose default only it is that the indorsor warrants: and be- his was a point unsettled, and on which there are con- ory opinions in *Salk.* 131. and 133. the court took time to er of it.

l on the second argument they delivered their opinions, e declaration was well enough. The design of the law chants in distinguishing these from all other contracts, by g them assignable, was for the convenience of commerce, ey might pass from hand to hand in the way of trade, in ne manner as if they were specie; now to require a de- upon the drawer, will be laying such a clog upon these bills,

bills, as will deter every body from taking them: the drawer lives abroad, perhaps in the *Indies*, where the indorsee has no correspondent to whom he can send the bill for a demand, or if he could, yet the delay would be so great that no body would meddle with them. Suppose it was the case of several indorsements, must the last indorsee travail round the world before he can fix his action upon the man from whom he received the bill. In common experience every body knows, that the more indorsements a bill has, the greater credit it bears; whereas if those demands were all necessary to be made, it must naturally diminish the value, by how much the more difficult it renders the calling in the money. And as to the notion that has prevailed, that the indorsor warrants only in default of the drawer; there is no colour for it, for every indorsor is in nature of a new drawer, and at *nisi prius* the indorsee is never put to prove the hand of the first drawer, where the action is against an indorsor. The requiring a protest for non-acceptance is not because a protest amounts to a demand, for it is no more than a giving notice to the drawer to get his effects out of the hands of the drawee, who by the other's drawing is supposed to have sufficient wherewith to satisfy the bill.

See 2 Bur. Rep. 669.

Upon the whole, we are of opinion, that in the case of a foreign bill of exchange, a demand upon the drawer is not necessary to make a charge upon the indorsor, but the indorsee has his liberty to resort to either for the money. Consequently the plaintiff must have judgment.

Dominus Rex *versus* Carter.

INdictment for trespass before justices of peace, and excepted that it did not appear they had any jurisdiction, for want of *necnon ad diversas felonias transgressiones et alia malefacta in comitatu praedicto perpetrata audiendum et terminandum assign'*, for these words are in all the commissions ever since 18 *Edw.* 3. and the opinions have been, that without that clause the justices as justices cannot hear and determine. *Lamb. Just.* 46, 47. *Cro. Jac.* 633. 1 *Ven.* 33. 2 *Keb.* 160. 2 *R.* 3. 9.

Hil. 10 *Geo.* *Rex* v. *Straw.* Another quashed on the authority of this case without debate.

Et per curiam, The indictment must be quashed. At first the justices were only conservators of the peace, and the subsequent power to hear and determine given by the statutes 18 and 34 *E.* 3. is only that by commission they may have such a power. The commission of the peace appears to have been altered into the present form immediately after making those statutes, which shews the opinion of the King's counsel at that time.

time. *Lambart* says, that *they shall have power*, which must be understood *by commission*. As therefore this is not a proceeding upon their common law jurisdiction, but a jurisdiction given by statute; whenever they hold such pleas, they must shew an appointment to hear and determine, and we cannot intend that they have such a power.

Everett *versus* Gery.

ON the return of the second *scire facias* against bail, a four days rule was given, and on the fourth day the principal brings error, and Mr. *Wearg* thereupon moved to stay proceedings against the bail, pending the writ of error; and cited *Myer* v. *Arthur*, *ante* 419. and *Church* v. *Throgmorton* in the House of Lords, where the House threatened to commit the attorney, for proceeding against the bail pending error in Parliament.

Where error is not brought till it is too late for the bail to surrender, the court will not stay proceedings. *Trin.* 10 *Geo.* *Aldridge* v. *Snowden*, they did not move till both *sci. fac.* were out and the rules upon them, and the court held they came too late. See ante, 419. 2 Stra. 872, 1270.

As to the first case, the court said, it differed, for there the bail came in time, while they might surrender the principal; which they cannot do here, after the return of the second *scire facias*, at which time no writ of error was brought. And as to the case in the House of Lords, it was there agreed, that the court below could not restrain them; but the Lords said they expected more respect. *Curia*. We can make no rule.

Dominus Rex *versus* Landen.

A Conviction of forcible entry was moved to be quashed, because taken before justices *ad pacem in comitatu praedicto conservandam assignatis*, without saying *pro comitatu*. *Salk.* 474. *Sed per curiam*, Let it be quashed for another fault, that it is in the preterperfect tense *accessimus et vidimus*, whereas it should have been in the present tense.

Conviction of forcible entry in the preterperfect tense ill.

Dominus Rex *versus* Stapleton.

STRANGE moved, that the defendant, who was convicted for a misdemeanor, and lay in execution for the fine, might assign errors by attorney, to save the charge of being brought up; the clerk saying it could not be otherwise without leave of the court. *Curia*. It is in our discretion, let it be so.

Practice.

Watkins

Watkins *verſus* Parry.

Ann. c. 16. [i]n caſe of bail [b]ond the arreſt [of] the principal is [n]ot traverſable. [C]ortefc. Rep. 54.

DEBT upon a bail bond, the defendant traverſed the arreſt of the principal; and on demurrer judgment was given for the plaintiff; for otherwiſe this will be a way to avoid all bail bonds that are civilly taken, without expoſing the party by an arreſt.

Dominus Rex *verſus* Barber.

[I]n attachment, [pa]rty not bound [to] anſwer what [m]ay convict him [of] another of[fe]nce.

HE preſented a petition to the common council of *London*, reflecting upon one of the aldermen, and uſed contemptuous words of this court at the ſame time. For the petition the court granted an information againſt him and thoſe who ſigned it, and for the contempt, an attachment.

The proſecutor in his interrogatories aſks him, If *he* did not preſent the petition, and uſe ſuch and ſuch words. And now the defendant moved, that the interrogatory, as to preſenting, might be ſtruck out, becauſe it is making him accuſe himſelf of that which will convict him of the libel. *Et per curiam*, He is not obliged to anſwer it; you may aſk him whether, when the petition was preſented, he did not ſay ſo and ſo; therefore let that part of the interrogatory be ſtruck out.

[N]. *B.* This [pr]oſecution went [n]o further, the [ac]t of grace, in[te]rpoſing.

N. B. I drew them at firſt as the court now ſettled them, *but* that queſtion was put in after they went from me, though *I* cautioned the attorney againſt it.

Dominus Rex *verſus* Clarkſon et al'.

[O]n a *habeas* [co]*rpus* the court [w]ill make no [ot]her order as to [th]e party, but [to] ſee he is under [n]o illegal re[ſt]raint.

DIBLEY pretending to have married Mrs. *Turberville*, a lady of fortune, took out a *habeas corpus* directed to her guardians, commanding them to bring her into court. To this writ I drew a return, that by her mother's will ſhe was committed to the care of Mrs. *Clarkſon*, who had put her out to ſchool to the other defendant, where ſhe had continued ever ſince with her own liking, and with the approbation of her guardian; and that ſhe now remains there of her own accord, under no reſtraint: *et nulla alia eſt cauſa*, &c.

[S]ee poſt, 579.

When ſhe was brought into court, and the return had been read, the Chief Juſtice aſked her, if ſhe deſired to be taken out

of

of the hands of the perſons ſhe lived with, and go with *Dibley*? She denied him to be her huſband; and deſired ſhe might continue with her guardians. *Et per curiam*, We have nothing to do to order her to go with *Dibley*; but only to ſee that ſhe is under no illegal reſtraint: all we can do is, to declare that ſhe is at her liberty to go where ſhe pleaſes. But, leſt this writ be made uſe of by *Dibley* as a means to get her abroad, and ſeize her, (as I told the court we had reaſon to apprehend), we will order our tipſtaff to wait upon her home to her guardians: and ſo it was done in lady *Harriot Berkley*'s caſe, 3*d Vol. State Trials*, 544. 4*th Edit.*

Power *verſus* Jones.

THE defendant brought a writ of error *coram vobis*, and aſſigned infancy and appearance *per* attorney. *Strange* moved, that the attorney might be obliged to ſet it right, and cited *Goodright* v. *Right*, and *Stratton* v. *Burgiſs*. But the court ſaid they could not do it in this caſe, becauſe here was no expreſs undertaking to appear, as there was in thoſe caſes; if there had, the court would oblige the attorney to do it in a proper manner.

Appearance of infant by attorney, not amendable. Ante, 25, 114.

Buſby *verſus* Greenſlate.

At niſi prius *in* Middleſex, coram Pratt *C. J.*

IN ejectment the Chief Juſtice ruled this caſe. *A.* ſurrendered a copyhold eſtate to the uſe of his will, and then deviſed it to *B.* for life, and after his deceaſe to the heirs of his body. *B.* died after making the will; and it was held, that his heir could take nothing, for it is a deviſe in tail to *B.* and *his heirs* are words of limitation; and then *B.* dying in the life of the deviſor, it is the ſame caſe with *Fuller* v. *Fuller* in *Cro. El.* and *Goodright* v. *Right*. And the Chief Juſtice ſaid, it made no difference, that thoſe caſes were of freehold lands, and this of copyhold where the deviſee was living at the time of the ſurrender.

Where the deviſee of copyhold dies after the ſurrender and before the death of the deviſor, the deviſe is void.

In this caſe a perſon, who had ſold the inheritance without any covenant for good title or warranty, was allowed to be a witneſs, to prove the title of the vendee.

Vendor witneſs as to title, where no covenant for warranty, &c.

Jocelyn

Jocelyn *verſus* Hawkins.

At Guildhall, coram Pratt.

In contracts for ſtock the computation muſt be by lunar months.

THE contract was to deliver ſtock one month after; th[illegible] tender was according to the calendar month. But th[illegible] Chief Juſtice ruled it muſt be a lunar month, though we calle[illegible] a great many witneſſes to prove the courſe of the alley to be t[illegible] reckon according to calendar months. So my client was called [illegible] *Vide* 4 *Mod.* 185.

Anonymous.

At Niſi prius, coram Pratt *Chief Juſtice*, *in* Middleſex.

Action againſt a conſtable not confined to the proper county, where he does not act in execution of his office.

TRESPASS and aſſault. On the evidence it appear[illegible] the defendant was a conſtable, and lived at *Dover*, an[illegible] that being ordered to take the plaintiff and carry him before th[illegible] mayor, he executed his warrant, and the mayor diſcharged th[illegible] plaintiff. Soon after which a diſpute happening between th[illegible] plaintiff and the defendant, the defendant beat the plaintiff, fo[illegible] which this action was brought.

For the defendant they inſiſted, that he being a conſtab[illegible]ble they ſhould have brought the action in the proper county, [illegible] according to the ſtatute 21 *Jac.* 1. *Sed per Pratt* Chief Juſti[illegible]ice, That is only where it is for a matter relating to the execution [illegible] of his office; but if, after his authority is expired, he abuſes [illegible] the party; or if he meets a man and knocks him down, he may [illegible] be ſued for it as all other people may.

Dominus Rex *verſus* Jeffries. Ibidem.

Evidence.

KEBLE's ſtatutes and *Raſtal*'s differed, and they wh[illegible] for adhering to *Keble* proved that they had examined [illegible]im with the Parliament roll. The Chief Juſtice ruled it [illegible]as enough, and *Keble* was read.

ıchy *versus* The Duke of Somerset. In Canc'.

ıtiff brought his bill to be relieved against a for- f his copyhold by making leases contrary to the manor without licence of the lord, felling tim- ones, and grubbing up hedges; offering to make And on the pleadings the case was this: Sir ised of a copyhold estate of inheritance of 90 *l.* l of the manor of *Petworth*, of which the Duke ord, made a lease of part of it for seven years : at 13 *l. per annum.* The Duke upon this brings gainst all the plaintiff's copyhold, which occa- ntiff to bring a bill in his own and his son an for relief. The Duke in his answer insisting on : forfeiture, besides the making the lease with- r *Harry* brought a supplemental bill for discovery inst those other forfeitures: upon the plaintiff's nt in ejectment subject to the order of the nction was granted, and now upon the hearing out out to be this.

No relief against a voluntary forfeiture of copyhold estate. 6 Vin.Abr.113. pl. 9. Prec. in Chanc. 568. pl. 347, 572.

larry's marriage in 1693, all the copyhold lands ed to the use of Sir *Harry* for life, with remainder l every other son in tail male, in pursuance of efore marriage for that purpose, but no ad- taken upon that surrender. Before Sir *Harry* , there had been a quarry of stone in the , the copyhold, and during Sir *Harry*'s in the copyhold; but whether it was first hold in the plaintiff's time did not appear. plaintiff's house, which consisted both of old, was planted with timber trees by the the plaintiff had topped those trees that hold part of the avenue, by which from : become pollards. There were several aries of lands upon the copyhold, which the ed up and destroyed; but whether they are n copyhold and freehold, or only between her of the copyhold, did not appear. And the plaintiff, as before mentioned, let part r seven years, without licence or any custom arrant it.

me in question, whether any, and which of u are forfeitures at law? And if so, whether ch f them are relievable in equity? And if not, n's case is to be distinguished from the father's.

1. Whether

1. Whether theſe are forfeitures at law? Which were of four ſorts: the digging the quarry, the topping the timber trees, the deſtroying the boundaries, and making the leaſe without licence.

As to the quarry the plaintiff's counſel inſiſted, it was opened even upon the copyhold in his father's time, and ſo purged by the admittance; and his digging in it ſince was but like the caſe of leſſee who may dig in quarries and mines that were open at the time of his leaſe, though he cannot upon any new ones.

As to the topping of timber trees, which the plaintiff inſiſted was done only for the uniformity of his walk, and without deſign to injure the lord, It was anſwered that it was voluntary waſte, and the motives for doing it are not material to the lord.

As to the deſtroying the fences, a caſe was cited out of *Litt. Rep.* 264, *&c.* where grubbing up the fences and removing the boundaries upon copyholds were held to be forfeitures, without diſtinguiſhing between the outward boundaries and thoſe within the copyhold, as it tends to the deſtroying the evidences relating to the lord's intereſt in the eſtate. And ſaid it is on this foundation laid down 1 *Inſt.* 53. that though a tenant might cut down wood to repair fences as he found them, yet not to make new fences.

As to the making the leaſe without licence, it was acknowledged on all ſides to be a forfeiture at law.

2. The next queſtion was, whether ſuppoſing all theſe to be forfeitures, relief was proper in this court, either upon the general caſe of theſe ſort of forfeitures, or any particular equitable circumſtances that may be in the preſent caſe.

For the particular equitable circumſtances of this caſe, one was, that the ſteward's deputy ingroſſed and was a witneſs to the leaſe. This was compared to the lord's being privy to or witneſs to ſuch leaſe, which would be held in equity as a permiſſion or kind of licence; and it has been held, that licence granted by a deputy ſteward was good. But anſwered, that this rather aggravated the injury, by making the lord's ſervant a party in the confederacy to injure him.

Another circumſtance was the plaintiff's not having notice of this cuſtom. But this is not material, for the tenant comes in under the cuſtoms of the manor, and is bound to take notice of them; and beſides, this is common law.

But

But if those circumstances were not sufficient to ground a ief upon, whether the general nature of those forfeitures will t admit of relief.

In favour of the plaintiff it was argued, that it is a sort of axim that all forfeitures are odious. That copyholds are now come a more fixed and established estate than they were rmerly, and the law itself has been altering these 100 years ry much in their favour; and therefore a court of equity ought go as much in their favour, to keep them out of that vassalage id subjection which the original nature of their estates laid em under, which their present fixed condition seems inconsistent with. That the forfeitures are intended only to secure e lord's rents and services, and therefore very proper for a urt of equity to interpose and prevent his having more than at security. And this is agreeable to the common cases of reef against the penalty of a bond, and upon mortgages, and conitions of re-entry on non-payment of a rent, and *nomine poenae*: which cases this court will not allow the parties to take any ther advantage of the forfeitures, than what is necessary to tisfy the original intent of the agreement. The law has anexed these conditions in the case of copyholds instead of the rties; but as it had something else in view by them, than the aining the land to the lord; this court may make amends to e lord, and fulfil the design of the law, and save the estate to e party. In the case of making a lease without licence, the tent of the law in making that a forfeiture is, to prevent the rd's being disinherited of his interest in the copyhold, and to cure the fine due on a licence; both which may be easily cured, by obliging the tenant either to accept a licence, or ake surrender and admittance and pay the fine; which will e a compleat recompense for any injury the lord may have ffered; and then it comes within the common rule, that this ourt will relieve against forfeitures, wherever a compleat sasfaction can be made for the injury which is the cause of the rfeiture.

Several cases were cited. *Shelly* v. *Mason* in Lord *Coventry*'s ime, 5 *Car*. 1. where a copyholder came into this court to be elieved against a forfeiture by making lease without licence, nd decreed the lord to account for the profits he had received ince his entry, and pay the costs. 1 *Chan. Rep*. 51. where a copyholder was relieved by Lord *Coventry* for non-payment of ine on admittance. *Cox* v. *Hickford* by Lord *Harcourt*. The ill was to be relieved against a forfeiture by suffering a copyold tenement to fall to ruin, and refusing to repair it for 30 ears together, though frequently ordered to do it by the lord; he Chancellor refused to grant relief on two accounts, his bstinacy, and the lord's having been in possession nine years 2 Vern. 664

 after

after his entry, in which case great stress was laid on the obstinacy of the copyholder. Case of *Rowland* v. *Dean of E...n*, where relief was granted against a forfeiture by cutting timber. 2 Vern. 537. *Gnash* v. *Lord Derby*, the decree of which was now read in court. The plaintiff having a copyhold tenement that wanted repair, applied to the defendant the lord of the manor to have some timber assigned for that purpose, but the lord refused to assign any; upon which the plaintiff hearing that there was a custom in the manor for two tenants to assign timber for the purpose of repair, did get two tenants to make such assignment, and then cut the trees down; upon which ejectment was brought, and a verdict for the lord, there being no such custom: the plaintiff brought his bill for relief, which was granted on his paying the value of the timber and costs at law and in equity. *Cudmore* v. *Raven*, where a quaker being tenant of a copyhold refused to take the oath of fealty, and the lord entered for the forfeiture, and the tenant was relieved. *Cox* v. *Brown*, 1 *Chan. Rep.* 170. a lease being made on condition not to assign it without licence, the tenant did assign; but relief was granted on search of precedents; it being the case of an assignee of an executor makes no favourable circumstance, because there were assets without it. *Thomas* v. *Porter*. Tenant of a copyhold *durante viduitate* cut down timber upon one Abr. Ca. Eq. 121. copyhold in order to repair another, which was a forfeiture; but yet relief granted in this court.

If it is a difficult matter to ascertain damages in any of these cases of forfeiture, it is because there really is no damage; and surely it is no reason against relief, that the person who seeks it has done no injury.

For the defendant, these distinctions as to relief against forfeitures were insisted on. Whether the forfeiture was for nonfeazance or malfeazance, whether the condition was annexed by law or the party, whether there were any particular circumstances of equity or not.

As to the difference between nonfeazance and malfeazance, as where tenant refuses to pay a fine upon admittance; this court will relieve, on doing that which he ought to have done. The difference is only as to the circumstance of time, which this court easily supplies. So where there is only permissive waste, the court has relieved; but if by obstinate refusal this forfeiture is aggravated, the court will look upon it as voluntary waste, and not grant relief, as in the case before cited of *Cox* v. *Hickford*.

All the instances of forfeiture in the present case are of voluntary acts. One is making a lease without licence, which is a dif-

a disseisin of the lord, 4 *Co*. 21. *b*. and an attempt to disinherit him. The others are all voluntary wastes.

The next distinction is between conditions in law, and by the party. The intention of the parties is easy to be discovered, and you answer the end of the contract, if you give them every thing they expected, which may in many cases be easily done. This is the case of all mortgages, conditions of re-entry on non-payment of rent, *&c*. But even in conditions of the parties, where the ascertaining the damage is not plain and clear, the court will not relieve against such conditions or penalties. It was never known that this court relieved against a *nomine poenae* for ploughing up ancient meadow. It was denied in the duchy of *Lancaster*, *Eyre* v. *Hatton*.

But in cases of forfeitures on conditions in law this court seldom relieves. If tenant for life makes a feoffment, or levies a fine *sur conusance de droit come ceo*, *&c*. it was never pretended this forfeiture could be relieved in equity. Or if the reversioner brings waste on the statute for recovery of the place wasted, equity would not interpose. Those conditions in law are a sort of limitations of the estate of the party, and though the intent of the party is never so plain, equity will not alter the legal construction of the words: as where by will one gives an estate to *A*. for life, remainder to the heirs male of *A*. equity will not give the son of *A*. a remainder, and confine *A*.'s to a life estate, though the intent was plainly so.

But though this is generally the state of forfeitures, yet there may be some circumstances of equity to ground relief upon; and wherever the court has granted relief, it is upon some such circumstances, as where the party who is to take advantage of the condition is himself the means of its being broke. It was said by Lord *Somers* in the case of *Bertie* v. *Falkland*, that conditions precedent are not relievable, unless some indirect means be used by the party to prevent the performance. So in the case of *Hammond* v. *Hinge* before the present Chancellor, where a lord of a manor tells one that had a freehold held of his manor, that it was copyhold, and he must be admitted by copy of court-roll, and pay a fine: the lord was in this court obliged to erase the admittance, and repay the fine. Salk. 231.

The third question relates to the infant plaintiff, whether he is in any better condition than the father.

It was admitted on all hands, that if an admittance had been taken pursuant to the surrender upon the marriage, the son being remainder-man could not be prejudiced as to his estate by the forfeiture of the tenant for life: only in that case the bill

was too early for the fon, whofe intereft was not concerned till the death of the father.

But though the fon has no legal right, yet there being a furrender to his ufe, and this purfuant to a marriage agreement; it fhall be confidered in a court of equity as if it had been executed, and the infant would be very proper to bring a bill in this court againft the father and the lord, in order to admit his father purfuant to the furrender, that he might in law be intitled to the remainder.

On the other fide it was faid, that Sir *Harry* not being admitted upon that furrender, continued tenant under his former admittance; and the lord was no party to, or concerned in the marriage fettlement, his title was paramount to that, and confequently the forfeiture affected the inheritance, and fhould not be fubject to or limited by the private trufts or tranfactions of the parties.

Lord Chancellor. This is a point of fo great confequence, that if relief could be given in this court, it is ftrange it fhould not have been found out long ago. The forfeitures in thofe cafe arife purely from the imbecillity of the copyholder's eftate. He was originally merely tenant at will, and is fo ftill on all accounts but as to the continuance of his eftate. There have been indeed very favourable conftructions for the copyholder in that particular, becaufe he is called tenant at will *fecundum confuetudinem manerii*; it has been held, the lord cannot determine his will but according to that cuftom. The true meaning of thofe words *fecundum confuetudinem manerii* was not to bound the lord's pleafure in the determination of his will, but that the tenant as long as he continued tenant was to hold his land under thofe terms and conditions which the cuftom had eftablifhed.

Thefe matters which are mentioned as forfeitures, are indeed limitations of the eftate; fuch as determine it, when they happen. Tenant for life making a greater eftate than his own, gives up or furrenders the right which he had before, and yet he does no damage to the remainder man. So tenant by copy taking upon him to make a greater eftate than by law he may, and contrary to the nature of his eftate, does by that determine his eftate: the law has made it fo; and what is there in this cafe to ground relief upon, and require me to fet afide the law?

It is a hard law, and therefore the party muft not be fubject to it; but is not this directly repealing the law?

In

In action of waste for recovery of the place wasted, it is ertain and admitted this court cannot relieve; and yet this may e called a very unconscionable thing. But is it so to take advantage of a law which is known and equal to all? Nor can I e any difference, whether the statute makes this condition, or e common law makes it.

It is not sufficient to say here is no damage in this case, nd therefore it is there can be no recompense given by this ourt, for it is the recompense that gives this court a handle to rant relief.

The true ground of relief against penalties is from the original intent of the case, where the penalty is designed only to secure money, and the court gives him all that he expected or esired: But it is quite otherwise in the present case. These enalties or forfeitures were never intended by way of compensation, for there can be none.

But even in the case of copyholds there are some cases of forfeitures intended for a different purpose, as for non-payment of rent or fines, which are only by way of security of the rent or fine; and therefore when these are paid afterwards with interest, the money itself is paid according to the intent, only as to the circumstance of time; which is the true foundation of the relief which this court gives in those cases.

Cases of agreements and conditions of the party, and of the aw, are certainly to be distinguished; you can never say the aw has determined hardly, but you may that the party has made a hard bargain.

Thus it stands on the general state of these kind of forfeitures. But what equitable circumstances are there peculiar o this case? It is certain there may be circumstances, which may make it fit and equitable for this court to relieve, either in hese cases or in actions on the statute of waste: if the lord hould give the tenant encouragement by *parol* only to pull own a messuage, and he did it accordingly; this might induce e court to prevent the lord's taking advantage of a fraudulent ct of his own. In the present case, if the lord had been present at the making the lease, and advised it; relief might be easonable: but the steward's standing by, or even ingrossing e lease, is rather a circumstance against relief, as it looks like confederacy to cheat the lord, and break the customs of the manor.

As to the other cafes of forfeiture relating to the quarry, the topping the trees, and the deftroying the boundaries; there does not enough appear to determine, whether they are legal forfeitures or no: but if they are, I think they are all, as the making the leafe, under the fame confideration in this court, and not proper for relief.

As to the infant, his cafe does not feem as yet ripe for this court; but it may be a queftion how far his equitable intereft will intitle him to be fecured againft thefe forfeitures.

I am apprehenfive the lord muft always have fuch a tenant upon his lands, as may be fufficient to anfwer all demands, and capable of committing forfeitures.

Suppofe one lets a truftee be admitted for him, who commits a forfeiture; no doubt the eftate would be forfeited, and the *ceftuy que truft* would have no equity againft the lord.

Suppofe the truftee fhould die without heir, the lord would be intitled by efcheat, without being fubject to the truft.

The perfon who is the legal tenant, is fubject, with regard to that eftate, to all the imbecillities of that eftate; if not, by the means of a truft a copyhold would be entirely difcharged from all thofe imperfections it labours under, and the lord's intereft be taken away, for the lord can take advantage of no body's acts but thofe of his tenant. He is not at all concerned with the private agreements or trufts of the parties.

In the prefent cafe, fuppofe Sir *Harry* admitted according to the furrender, the infant is then tenant in remainder, and the father's act cannot prejudice the fon, who is now admitted as a diftinct tenant. But till admittance the fon is no tenant; and fuppofe when he comes of age he fhould releafe to his father, there would be no occafion for any admittance at all, but Sir *Harry* would continue tenant upon his old admittance. The lord is not bound to take notice of any thing, but what appears on the court rolls.

I am therefore apprehenfive, it will be a hard cafe to relieve the fon. But I agree, that if the lord's fine for admittance be paid, though there was no actual admittance, fince the lord received all the advantage that could be had from the admittance, it might be a good reafon for relieving the fon; and then it might be proper, perhaps even now, for the fon to bring a bill againft

againſt his father and the lord, in order to have his father admitted purſuant to the ſurrender. But it does not appear whether the fine was paid.

I ſhould therefore for theſe reaſons diſmiſs the bill abſolutely. But ſince the points of law are diſputed as to all the forfeitures, excepting the making the leaſe, which concern other parts of the copyhold, and ſince judgment in ejectment is given, which would take in other lands as well as thoſe comprized in the leaſe; I think the bill ſhall be retained, till the points of law are tried at law upon the ejectment, which the plaintiff ſhall immediately receive declarations in, and plead to trial.

As to coſts, they ſhall wait the event of the trial, and as to them I think the equity of them will depend upon the iſſue of that; if the plaintiff recovers there, he ſhall pay coſts here, becauſe he had no occaſion to come into this court, excepting as to the diſcovery. If the Duke gets the better, I think as this is a point of equity that has not been fully ſettled before, and in ſuch caſe it is natural for a man to ſtruggle the moſt to retain his eſtate; it would be too hard to make him loſe his eſtate and pay coſts likewiſe.

As to the infant I will not diſmiſs the bill abſolutely, but without prejudice, becauſe being an infant he may not have made the beſt of his caſe.

Frederick *verſus* Frederick. Ibid.

The huſband covenanted to take up his freedom in *London*, but did not and his eſtate diſtributed according to the cuſtom.

1 P. Will. Rep. 710.

IN the year 1674, a match was propoſed between Mr. *Frederick*, ſon of Sir *John Frederick* an alderman of *London*, and Mrs. *Marino*, a city orphan, whoſe fortune was 8000*l.* in purſuance of which articles were entered into between Sir *John Frederick* and his ſon of the firſt part, Mrs. *Marino* and her relations of the ſecond part, and certain truſtees therein mentioned of the third part, by which it was agreed that Sir *John* ſhould pay 1500*l.* 5000*l.* part of it, to Mr. *Frederick*, and the other 1500*l.* to the truſtees, which with the 8000*l.* to be received from the chamber of *London*, ſhould be veſted in land, to be ſettled as uſual upon the huſband for life, remainder to the wife for life, remainder to the firſt and every other ſon in tail, &c.

Upon 25th of *February* application was made to the court of aldermen for licence for Mr. *Frederick* to marry Mrs. *Marino*, upon which ſeveral entries appear to be made that day; 1. That a licence be granted, if Mr. Common Serjeant approve of the marriage. 2. That when a perſon applies for a licence to marry a city orphan he ſhall be urged to take up his freedom. 3. A

 freedom

freedom is granted to Mr. *Frederick*, which he is to take up in a year's time.

The marriage ſoon after took effect, and 15th of *March* 1680, Sir *John Frederick* being then deputy Mayor, there is an entry, that upon conſideration Mr. *Frederick* had not taken up his freedom according to his agreement, whereby his wife would not be intitled to her thirds, it is referred to the Recorder and Common Serjeant, to conſider, whether the ſettlement upon the lady was agreeable to the intent of the court; but there were no further proceedings, neither did Mr. *Frederick* ever take up his freedom, but proved a very unkind huſband, and a ſevere father, and by his will deviſed 10*l.* only to his wife, 1000*l.* to his eldeſt ſon, and each of his daughters, and the reſidue of his perſonal eſtate, which amounted to 400000*l.* he gave to the children of his ſecond ſon.

The widow preferred her bill, that ſhe might have the benefit of the agreement, as if Mr. *Frederick* had taken up his freedom. And after ſeveral arguments Lord Chancellor pronounced his decree.

The demand of the plaintiff was grounded upon the common rule in a court of equity, that where an agreement is made upon a good conſideration, which is not performed, the party intereſted may apply to a court of equity, to have the ſame benefit as he would have had in caſe the agreement had been performed.

It was urged, that the articles made by Sir *John* and his ſon with the lady and her relations, and which was a compleat agreement, do not contain any ſuch clauſe that Mr. *Frederick* ſhould take up his freedom. Anſwer: An agreement between ſome parties does not hinder other perſons from entring into another agreement, and the agreement to take up his freedom was with the court of aldermen. Beſides, the relations of the lady had no power to diſpoſe of her in marriage, but the court of aldermen alone could make a legal agreement for that purpoſe; ſo that what was done by the relations was only propoſals to be laid before the court of aldermen; they might have diſapproved of the whole, or part, or have required ſomething further. They might have agreed by *parol* (for this was before the ſtatute of frauds) that Mr. *Frederick* ſhould do ſomething further; they did require ſomething further of Mr. *Frederick*, when they made their agreement with him, and this is proved beyond all doubt by the records of the proper court, which had cognizance of this affair, and had it then under conſideration; ſo that this is in nature of a fine, for it is an agreement of the parties entred upon record.

It

t was urged, that this was only done by the city to provide men of fubftance for the benefit of the city, and not de-ıed for the benefit of the lady, to be part of the agreement. fwer; This is a very ftrange conftruction, that a court of ermen, when they are tranfacting a thing which concerns infant under their care, fhould confider their own private ereft, without any regard to the benefit of the infant; this ıot to be intended of any perfons who act in a publick cha-ter.

It was argued, that if the common ferjeant approved the itch, the licence was to be granted abfolutely; and the agree-nt to take up the freedom was voluntary, and no part of e contract. Anfwer; What was referred to the common jeant was only the validity of the fettlement in point of law; t the fufficiency of it, which the court of aldermen could dge of better than the common ferjeant. And the taking up s freedom is to be looked upon as part of the provifion.

It was argued, that it is probable this part was waived af-rwards. Anfwer; The court of aldermen could not waive , becaufe they were only truftees; and it is plain it was not aived before the marriage, becaufe the court of aldermen fome ears after inquire into the reafon why it was not complied ith, and the wife being a *feme covert* could not waive it.

It has been faid, that a court of equity ought not to give lief in this cafe, becaufe it is to fupport a cuftom againft the les of law. Anfwer; A court of equity will fupport and xecute a contract made upon a good and fufficient confidera-ion, whether it relates to a cuftom or not, and will prevent a audulent avoiding of the cuftom, as a fraudulent difpofition of oods.

It has been urged, that if the city had applied for the guar-lianfhip and care of the orphan under this fettlement, they could not have had relief; becaufe he was not actually a freeman when he died. Anfwer; There is no confideration arifing from the city, and therefore no grounds for a court of equity to affift them.

It was objected, that the party being dead, it was become impoffible that a fpecifick performance fhould be had, and this court will not give damages. Anfwer; Though a fpecifick performance cannot be had, yet the end and defign of it may e obtained, which is all that a court of equity requires; for he had been alive, and defired not to take up his freedom, avoid the trouble and expence of bearing offices; and could have given the court fatisfaction, that his wife and children fhould

ſhould have the ſame benefit: I do not know that a court o equity would have compelled him to have taken up his freedom

Objection: It will be very improper to admit ſuch an application after his death; becauſe, had he been alive, he might have veſted his eſtate in land, and diſpoſed of it by will, as he has done of the perſonal eſtate. Anſwer; This is an argument not to be inſiſted upon in a court of equity, that the effect of the contract ought not to be decreed after his death, becauſe had he known that you would have inſiſted on it, he would have contrived ſome way to have avoided it: where money is veſted in truſtees to be laid out in land and ſettled upon *J. S.* in tail; if he dies before the ſettlement, he cannot diſpoſe of the money; and yet if the ſettlement had been made, he might have levied a fine, and ſuffered a recovery, and diſpoſed of the land. A caſe was mentioned, that where tenant in tail makes a mortgage by bargain and ſale, and covenants for farther aſſurance, and dies without levying a fine; a court will not compel the iſſue in tail to compleat the title. Anſwer; The iſſue in tail claims prior to the perſon who made the mortgage, and not as his repreſentative. But where tenant in fee-ſimple makes a ſale by bargain and ſale, which is not inrolled, with covenants for further aſſurance, a court of equity will compel his heir to make good the title, becauſe he is repreſentative, and claims under the covenantor. So it is in the preſent caſe. Therefore he decreed that one third ſhould go to the widow and one third amongſt the children, they waiving their legacies under the will. As to the other third, the will ſtands good as to that. Afterwards, in *May* 1731, the decree was affirmed in the Houſe of Lords.

Merrit *verſus* Rane.

Trin. 6 Geo. rot. 338.

On a covenant to transfer ſtock paying ſo much. Q. What is to be the firſt act?

THE plaintiff declares upon a ſpecial agreement, that in conſideration of 252*l.* paid to the defendant, he agrees to transfer 6000*l.* *South-ſea* ſtock to the plaintiff, his executors, adminiſtrators or aſſigns, at any time before the 9th of *January* 1720, within three days after the ſame ſhould be demanded by note in writing delivered to the defendant, or left for him at his houſe in *Angel Court*, upon payment of the further ſum of 9000*l.* Then he ſets forth, that he appointed one *James Martin* to demand the ſtock, and pay the price it was agreed to be ſold at, who, on the 25th of *March* 1720, left a note in writing at the defendant's houſe, requiring him to transfer the ſtock on the 28th, where he ſays he attended

attended all the while the books were open, but the defendant did not appear to transfer. The defendant pleads, that the demand was made by the plaintiff the 20th day of *January*, and that upon the 21ſt he transferred the ſtock according to the agreement. The plaintiff replies, that he did not transfer the ſtock on the 21ſt *modo et forma* as he has pleaded. And the defendant demurs.

Wearg pro defendente took ſeveral exceptions.

1. This contract cannot be aſſigned, for it is a *choſe en action*; and therefore the defendant was not bound to transfer to *Martin*, becauſe that would not have been a performance of his agreement. And if it be ſaid, that *Martin* is not an aſſignee of the contract, but only a perſon authorized to pay the money and take the ſtock; the objection to that is, that his authority is only to demand, not to receive the ſtock, for ſo the plaintiff has made his caſe in the declaration.

2. The demand is to be by notice to the defendant, or leaving a note *for him* at his houſe; but here the averment is only that a note was left at his houſe, and perhaps that might be ſo managed as never to come to his hands, which was deſigned to be obviated by the words *for him*.

3. The agreement is, that upon the transferring the ſtock the plaintiff ſhall pay 9000 *l.* which if it be not a condition precedent, yet, according to *Turner* v. *Goodwin*, it is at leaſt a concurrent act; and therefore the plaintiff ſhould have ſhewn, that he had the money there to have paid upon the transfer; but all he ſays is, that *Martin* attended to accept the ſtock, not to pay for it, though his authority was at firſt both to demand and pay.

Fortesc. Rep. 145.

4. But if the declaration be good, yet the replication is ill, for the demand pleaded was on the 20th, and the transfer the 21ſt, which was the next day, ſo that if the iſſue was found for the plaintiff it would not do, becauſe the jury could not find a breach of the condition in ſaying he did not transfer on the 21ſt, when he had two days after that to do it by the plaintiff's own ſhewing. It is to all purpoſes the ſame with payment before the day.

Reeve contra. I agree, *Martin* cannot be a legal aſſignee, but only a perſon appointed to tranſact this matter on behalf of the plaintiff. The aſſignment of a bond is good to ſome purpoſe, for it amounts to a covenant that the party ſhall have the money when received. *Martin* is appointed to require the ſtock and pay for it, which neceſſarily gives him a power to take it.

Aſſignment of a bond amount to a covenant that the party ſhall have the money.

2. Notice

2. Notice left at a man's houfe is in the nature of the thing a notice left *for him*.

3. The money was not to be paid but upon transferring, fo no neceffity of a tender; and we having fhewn that the defendant was not there to perform his agreement, that is enough to intitle us to our action.

4. Here the day is material, and might therefore very properly be made parcel of the iffue.

Chief Juftice. *Affign* fignifies no more than a perfon appointed to accept; and he being authorized to require and pay, furely that is enough to impower him to receive it. The notice is fhewn to be *for him*, how elfe could it be a requeft to him to do the act, which the declaration fhews was made?

The payment of the money is not a condition precedent, but a concurrent act; and if the defendant had been there, the plaintiff muft have laid down his money, though not fo as to part with it till transfer; and fo it was held in the cafe of *Turner* v. *Goodwin*.

As to the replication, confider, if the defendant fays he did it on a day fooner than he was obliged, whether it is not enough to fay he did not do it on the day he pleads he did; for it muft be taken he had waived the benefit of any longer time.

It was fpoke to a fecond time upon the former exceptions. And *Fazakerley pro defendente* infifted, that the plaintiff ought not to have fixed the day, but have left the defendant to his liberty of appointing which of the three days he pleafed, fince that time was given in eafe and for the benefit of the defendant.

Sed per curiam: The demand was made to have the ftock at the time moft for the defendant's advantage; and if it fuited his convenience to do it fooner, he might have given notice to the plaintiff. As to the plaintiff's not fhewing a tender, we think that ought to come from the defendant by way of excufe, that he was there ready to have transferred, if the plaintiff or any body for him had been there to have paid the money. The notice as it is laid is well enough within the meaning of the contract, for it muft be a notice left *for him* if what the declaration fays be true, that notice was left at his houfe *requiring him* to transfer the ftock. As to the exception taken on the former argument to the replication, the court did not much debate it, becaufe admitting it ill, yet then the plea

Plea was fo too, and it muft confequently come to be adjudged on the goodnefs or badnefs of the declaration.

The plaintiff had judgment, which was affirmed in the Exchequer Chamber and Houfe of Lords.

Oates *verfus* Robinfon.

UPON a trial in ejectment a cafe was made, on which the fole queftion was, whether after an extent upon a ftatute into one county, and a *liberate* returned and filed, the conufee can have any other extent into another county.

Q. Whether there can be a re-extent into another county, without a total eviction.

2 Will. Rep. 91. Fortefc. Rep. 373.

Serjeant *Chefhyre* argued, that he might. At common law there could be no execution againft lands, but in the cafe of the crown; and when it was given in the cafe of the fubject, he was to extend all the lands, or elfe the tenant where part only was extended might defeat it by *audita querela*. 3 *Co.* 14. 2 *Inft.* 296. And where the lands lay in feveral counties, there was a neceffity for feveral extents and *liberates*. *Mo.* 524. 2 *Cro.* 506.

There are many precedents before the 32 *H.* 8. *c.* 5. fome where the extent went into feveral counties for the whole debt, *Co. Ent.* 296, 297. which indeed is is the propereft way, becaufe the judgment is entire, and others into one county for fo much of the debt, into another for another part, and into a third for the reft. *Raft.* 596. *Dy.* 162, 208. *Mo.* 24. 2 *Cro.* 246. 2 *Bendlow.* 59. *Dalt.* 29. 1 *Sid.* 194. 2 *Roll. Abr.* 469. *pl.* 6. 482. *pl.* 16. *Fitzh. Execution* 40. So it is plain, that before the ftatute 32 *H.* 8. *c.* 5. we might have had this extent.

And as to that ftatute, the queftion will be, whether it has altered the law in this refpect: which it has not, becaufe that ftatute gives a remedy only in the cafe of a total eviction, which this is not, for this is only a further carrying on and perfecting the firft execution. The *fcire facias* is given only to the party who is evicted out of all, but that is not the plaintiff's cafe, and therefore he muft feek his remedy as he could by law before the ftatute. And in the *petty bag* there are abundance of precedents to this purpofe, the practice having never been difputed till this cafe.

Reeve contra. I agree this cafe depends upon the law as it ftood before the ftatute 32 *H.* 8. and I take the law to be, that it is not the return of the fheriff, but the acceptance of the party, that binds him in this cafe. Will any body fay, that after

after an extent of all the lands of the debtor in one county, a subsequent purchase of lands in the same county can be taken in? No body can say it, and yet it is certain if the purchase had been after the acknowledgment, and before the extent, it might have been extended: and why should there be any difference as to lands in another county? The rule in the *Register* 152. *a.* is, that in the case of extents into several counties, each must recite the award into the other county. The precedents of the debt's being divided, are an argument that if the first execution had been for the whole debt, it would have concluded the party. *Dy.* 162. 2 *R.* 2. 7. *b.* 15 *H.* 4. 14 *b.* 2 *Cro.* 338. 1 *Lev.* 92. 3 *Lev.* 269. *Lutw.* 429. In 2 *Lil.* 314. this very case is cited, and said to be ill.

There cannot be a new extent into another county, unless prayed at the time the first issued.

Per curiam, We are all of opinion, that if the prayer of an extent into the second county was entered at the time the first extent was taken out, then the second extent will be regular, otherwise not. *N. B.* Upon application to my Lord Chancellor he gave them leave to enter the prayer *nunc pro tunc*, so this court made no rule, but it went off upon proposals of going to a new trial. And the cause went down to trial; and a verdict for the plaintiff, subject to the Judge's opinion; who on hearing counsel ordered the *postea* to the plaintiff. And a writ of error being brought, and no good bail put in, the plaintiff had his execution.

Fazakerly *versus* Wiltshire.

Custom of the city of *London* that none but free porters shall carry corn, &c. good.

UPON a *habeas corpus* to the Mayor of *London*'s court, the custom of *London* is returned, that the porterage from any vessel on the river, and meeterage of corn, roots, &c. imported or exported, belongs to the city, upwards from *Staines Bridge* to *London Bridge*, and downwards as far as *Yendal* in *Kent*, and also another custom to make by-laws, confirmed by *Richard* the second, where any of their customs wanted *remedium congruum*.

That in the 18th year of King *James* the first a by-law was made by the corporation, " That the corn porters should be a " company with twenty-four assistants, who were called free " porters, who should work at a particular settled rate; and " that none but the free porters should intermeddle in importing or exporting any corn, roots, &c. within the bounds " mentioned in the custom, on pain of 20 *s.* for every offense, (except in time of danger or urgent necessity, or " in the case of *bona peritura*) the forfeiture to be recovered by action in the name of the chamberlain, and four " hundred porters are appointed for the future.

That

That the free porters have ever since used and exercised this law, till the defendant intruded by carrying of barley, though ce porter was present, *per quod forisfecit* 20*s*. which the plain- as chamberlain is intitled *ad exigendum et habendum*, and for ch he sues in the mayor's court.

'*af.* 6 *Geo.* it was argued by

erjeant *Pengelly pro defendente* againſt a *procedendo*, and that return be filed. 1. Becauſe it is informal in ſetting out the m. 2. Becauſe the cuſtom was ill. And then 3. The by- muſt fall of courſe. Or 4. Though the cuſtom ſhould be d, yet the by-law is ill.

. This is a franchiſe ſuppoſed to be veſted in the body po- k, and therefore ought to be claimed by preſcription, being onal. 2 *Roll. Abr.* 579. *pl.* 2. *Hob.* 85. the difference veen a preſcription and cuſtom is, that one is perſonal, and other local, and to be alleged in an inſenſible thing, as a e. 4 *Co.* 32. 6 *Co.* 60. 1 *Inſt.* 113. And the conſtruc- of them is very different, becauſe it is ſufficient if a cuſ- is reaſonable; whereas a preſcription muſt have a lawful mencement. *Dav.* 32. 6 *Co.* 50. *b.* And it is likewiſe in an abſurd manner, that they have time out of mind been ed by ſeveral names, and yet claim the porterage as be- ging time out of mind to a body called by the preſent name. 279. Nor have they averred any intereſt in the port, ſo o raiſe a merit in themſelves for what they claim.

. The cuſtom is unreaſonable, and ill.

. Becauſe it deprives a man of that natural right which he to employ one he knows and can truſt, and obliges him make uſe of a perfect ſtranger whom he may not be ſafe in ting. And it tends to no good end, as the preventing of d, becauſe when people are at their liberty to employ any y, they will for their own ſakes take care it is a truſty one.

. Becauſe it is not confined to the carriage of goods as a le, but extends even to what a man brings from his own den in the country for his private uſe in town. 1 *Roll. Abr.* 1. *pl.* 4. *Hob.* 189.

3. The city does not appear to be at any expence in re- ring the port, ſo this is not a toll for the uſe of the port, ich perhaps might account for the reaſonableneſs of its com- mencement.

mencement. 1 *Ven.* 71. 1 *Sid.* 464. 1 *Mod.* 47, 104. 2 *Lev.* 96. *Raym.* 232. In the cafe of *Cudden* v. *Gillftrup*, *Trin.* 12 *W.* 3. upon the cuftom of weighing at the city beam, it was pofitively averred, that the city kept a key, and had proper officers for the receiving of goods.

4. Becaufe it extends to places out of the limits of the city, and you cannot take notice what they are, as you do on a writ of error. *Salk.* 269. 1 *Ven.* 196. *Pal.* 44. By-laws will not bind out of the limits. 3 *Mod.* 158. *Jones* Sir *T.* 144. And then if it goes too far, and is void in part, it will be void in the whole; for a cuftom is entire. *Hob.* 189.

5. This is only a bodily labour, where no fkill is required, and therefore it is unreafonable to deprive the other freemen from exercifing this bufinefs by themfelves, or their fervants: and no length of time can make good an unreafonable cuftom. 1 *Roll. Abr.* 559. *pl.* 6. *Davis* 32. 11 *Co.* 86. 8 *Co. Waggoner*'s cafe. In the cafe of the *Mayor of Winchefter* v. *Wilks*, *Paf.* 4 *Ann.* it was held, that a right to trade could not be taken away without a confideration. *Salk.* 203.

3. If the cuftom is ill, the by-law will fall of courfe, becaufe it is not only liable to the fame objections, but to others alfo. For,

4. The by-law itfelf is ill,

1. Becaufe it exceeds the cuftom, which is only *to* and *from* fuch places upon the river, whereas the by-law prohibits the landing, carrying up and down from one fhip to another, and to warehoufes near adjoining to the port. And by the claufe which fettles the wages, it appears they go as far as *Cheapfide*.

2. It is not reftrained to the carrying goods for hire, but even where the owner carries his own, which is highly unreafonable. 1 *Roll. Abr.* 364. *pl.* 6. *Mo.* 576, 591.

3. The merchant or the publick have no benefit by this. *Mich.* 13 *W.* 3. *Lewis*'s cafe. An act of common council, that none fhould ufe dancing that was not free of the company of muficians, was held void, becaufe the party could not compel them to admit him. 5 *Mod.* 104. Here we cannot oblige a free porter to work, fo this goes in deftruction of trade; and fuch by-laws have always been held ill. *Palm.* 395. 2 *Roll. Rep.* 391.

4 The

The city ought not to impoſe a penalty for breach of their franchiſe. Would not a cuſtom that cattle depaſturing my common ſhould be forfeited, be held ill?

This is a great incumbrance to trade: the merchant is to meeter know his goods are ready to be landed, this is to gnified by him to one of the rulers, who is then and not rwiſe to appoint a porter.

r. Solicitor General *contra*. The firſt objection goes to all returns from the city of *London*, which are all by way of om, as in *Wagoner's* caſe, This amounts to a preſcription, in the caſe of a body politick, which has perpetuity, hen the calling it a cuſtom will not alter the caſe. The ner of claiming does not import that the city have had no than one name at a time, for a corporation may have al; and ſo it is enough to ſay, this franchiſe has been in time out of mind by either of their names. In the caſe e *quo warranto*, the preſent name of mayor, commonalty citizens was only mentioned.

to the merits. The general queſtion is, whether this w be good, ſo as to ſupport this action: and as on the hand the court will not ſuffer us to uſurp a juriſdiction we not, ſo on the other hand it will not deprive us of any privilege we may have.

agree this by-law is in reſtriction of trade, 1. By way of ſion of ſtrangers, and 2. By regulation for publick conence, both which I ſhall ſhew are proper and good. 1. The m is good; 2. The by-law has purſued it.

As to the cuſtom in reſtriction of trade, there are three : 1. Reſtraints where there is no one of the trade. *l.* 105. 2. Only partial, where ſome are ſuppoſed to uſe rade. Sir *William Jones* 162. 3. As to thoſe who are ſly alleged to uſe the trade, which is our caſe, and there member is preſumed to receive a benefit. *Cro. El.* 203. *ſt.* 195. *M.* 22 *H.* 6. 14. 2 *Brownl.* 177. 8 *E.* 3. 37. 125. Which are all caſes of reſtriction in particular ts for the benefit of perſons uſing the trade, and yet theſe s much againſt the common right of the publick. This m and by-law have been tacitly allowed. 1 *Mod. Caſ.* 123. n v. *Eaſtwick* was againſt the employer; and there indeed is held ill, becauſe he could not know who was or who not a free porter; but yet it was not diſputed as to the r of appointing porters. *Salk.* 143.

1. It is objected that this restrains bodily labour, and that too in a business for which no skill is required. *Answer:* Whether it be an art or not is never the measure, but the consideration is the right of the persons, as in the case of the *Gravesend* boat.

2. It is said here is no consideration, because the city is not obliged to provide porters. *Answer:* This is implied in the nature of the custom. It is stated that their officers have done it, and that amounts to saying they have maintained officers. The defendant might have given such a matter in evidence, and it would have been a sufficient excuse. 22 *H.* 6. 14. the case of a mill, and in the *Gravesend* boat case there was no consideration expressed. *Co. Ent.* 641. *Rast.* 9. *b.* 591. *Hearn.* 83. *Brownl. Red.* 63. 1 *Brown's Ent.* 68.

3. It was said here are not porters enough. This is answered by the power lodged in the mayor and aldermen to increase the number: but that is a matter of fact not before the court.

4. That the owner is restrained from carrying his own goods. *Answer:* He is not excluded, being tacitly excepted. *Pro mercede* shews it was intended only to take in the carrying by way of trade. And in *Wagoner's* case, it was said that making candles to be spent in a man's own family was not prohibited.

5. They say they have no recompense. But surely this objection is very hard after so long an enjoyment, when the circumstances which first established it are forgot. There were many tenures kept on foot, though people were at a loss how to account for them. It must be supposed this was created by compact between the founders of the city and the first traders.

6. This binds strangers. Do not all exclusive customs do so? And they are no otherwise useful than as they do so.

7. They say it extends beyond the limits of the city. *Answer:* The whole district appears to be within the port of *London*. 1 *Roll. Abr.* 557. *Calth.* 115. But that will not destroy the custom. Indeed without the custom the by-law would be void, according to the cases cited, which are all of by-laws. The customs of *London* are all confirmed by Parliament, and though I agree that extends only to good customs, yet it shews of what consideration the customs of *London* are above those of other places; and a particular regard has been always had to them, as

appears in *Wagoner's* cafe 126. 2 *Roll. Rep.* 277. This ry cuftom is averred in the return to have been confirmed by rliament.

2. The by-law has purfued the cuftom; it follows the words it, but then it is faid,

1. That the city have made themfelves judges in their own fe. But are there not many refolutions in favour of thefe laws? And was there not a penalty too in the cafe of the y beam; and yet it was allowed, becaufe no inconvenience uld follow, fince the court may judge of the reafonablenefs the penalty. 1 *Lev.* 16.

2. It is faid the freemen of the city are excluded. But is t this done in full common council, where their own con-t is implied? And why may not they confent to part with y branch of their privilege?

3. They tell us, it binds foreigners out of the diftrict. *An-r*: It is done by cuftom, and that according to *Wagoner's* e is good, even in the cafe of a private benefit. The by-r can only be void *pro tanto* as to what arifes out of the city, in the cafe of an award. 2 *Ven.* 33. This carriage ap-ars to have been in *London*, and fo within a part of the by-r that is good: and this anfwers another objection, that the -law exceeds the cuftom, for this is no cafe within the ex-fs.

The inconveniencies in this cafe are anfwered by the excep-n, which warrants a carrying by the non members in fuch fes.

The cuftom therefore we fay is good, and well purfued by e by-law: that the further provifions will not infect what is nfiftent with the cuftom; and even thofe provifions will be od under the notion of by-laws for the regulation of trade: is is a cafe within the cuftom, and therefore we pray a *pro-lendo*.

Pengelly replied. It has not been fhewn, and I rely upon it, it the merchant ought not to be obliged to employ thefe rters, when he has no means to compel them to attend and the bufinefs.

Curia advifare vult. And it was fpoke to this term upon ne of the objections that feemed to have moft weight with e court.

Wearg for the city. One objection is, that this is to reftrain man from the ufe of his bodily labour, to which every one s a natural right. But is not the cuftom to reftrain the ex-cifing a trade by one not free allowed, and is not this more

reasonable? If a man is not to use an art which he has been seven years in learning, and perhaps not able to turn his hand to any thing else, surely he may be restrained from one sort of bodily labour, and apply himself to another.

But the great objection is, that the custom as here laid extends itself out of the city. It does indeed appear to go beyond the walls, but what we rely upon is, that the liberties of the city and their superintendency on the river of *Thames* extends from *Staines Bridge* to *Yendal.* 14 *E.* 2. *Lib. regum antiquorum* 256. cited in *Stow* 35. It appears the justices in *Eyre* sitting in *London* took cognizance of a matter arising upon the river of *Thames*; the defendant pleaded to their jurisdiction, *et justiciarii dixerunt quod aqua Thamesiae pertinet ad civitat' London usque mare, et si velit respondeat.* 9 *E.* 4. *p.* 2. *m.* 7. It appears the King had granted to the Earl of *Pembroke* power to build a wear in the *Thames*, but upon complaint of the city it was repealed, with this declaration, *quod de antiquo jure habent cives London supervisum et gubernationem aquae Thamesis ad pontem de Staines. Stow.* 37. makes mention of them, and the records themselves are so. 1 *Roll. Abr.* 557. the very limits now in question are declared. And *in Scaccario*, 3 *J.* 1. *Ro.* 89. *Co. Ent.* 535. The Attorney General confesses the claim of the city to a jurisdiction on the *Thames* between *Yendal* and *Staines Bridge.*

The claim is confined to the port of *London*, which is an averment, that the port extends so far, and the court will intend the port to be part of the city, as in the case of a bridge it has been done. 1 *Lev. Bernard* v. *Bernard.* The custom of the city that their traders may set up in any part of the kingdom extends beyond the city, and yet that has been allowed. 1 *Mod.* 79. 1 *Saund.* 311. The case of the *Gravesend* watermen extends all the way between that town and *London*.

C. J. I am of opinion that both the custom and by-law are good, notwithstanding the objections that have been taken: I shall not go over them all, because the opinion of the court has been given as to some of them upon the former arguments.

A custom to restrain trade in a particular place is good; and surely much more so, where the restraint is only from bodily labour in one instance, than where it prevents a man from exercising an art he has been a long time in learning. I think the custom is good, as it is a convenience to the publick, and that there is an equivalent by the obligation the city is under to provide porters; if they do not, I am of opinion an action will lie, as in the common case of a ferry; neither is the merchant obliged to rely on an action only,

he may certainly employ who he pleafes if the free porters not attend. The convenience to the merchant is very :at, in having perfons ready to affift him as foon as he nes into port, and fo he is not obliged to go and fearch for ters who are ftrangers to him.

As to the objection about the extent, I think it is fully an-red by the ancient records that have been cited, and above by the confeffion of the Attorney General, which is of more ght than any of the reft; fince it cannot be imagined that King's Attorney would confefs a jurifdiction againft the wn, which the city had not the cleareft right to. We ft take the port to be within the limits; or if it went be-d the limits of the city, yet I do not fee how this cafe can diftinguifhed from that of the *Gravefend* watermen. The tom of meetage extends as far, and yet that has never been ftioned upon this account.

There is no doubt but a by-law may be good in part, and l for the reft; for where it confifts of feveral particulars, s to all purpofes as feveral by-laws, though the provifions thrown together under the form of one. I am of opinion re ought to be a *procedendo*. *Powys* J. *accord'*.

Eyre J. The reafons on which the other cuftoms of meet- and weighing at the city beam have been allowed, will port this; becaufe an action will lie, if the city do not pro- porters. Corporations or publick bodies are prefumed difcharge their duty in cafes of this extenfive nature better n any private perfons can. *Et per Fortefcue* J. If this was nconvenient cuftom, it would have been complained of re fo long an enjoyment. The cafe of carts was allowed, revent nufances; and we may put this upon the fame foot. *Cudden* v. *Eaftwick* the cuftom was allowed, and only de-mined, that it was ill to lay a penalty upon the merchant. ink it is enough to fay, that it does not appear that this om extends itfelf out of the port, though it is plainly ined to it, and we muft take notice of the extents of ports. s not the cuftom for trying felonies committed in *Middle-* t the *Old Bailey* extend itfelf through the whole county of *dlefex?* *Per curiam*, There muft be a *procedendo*.

rin. 2 *Geo.* 2. *Robinfon* v. *Webb* the fame return was made, upon my motion a *procedendo* was granted without argu-t, the point having been fettled the fame way in *C. B.* on emn argument. *Paf.* 13 *Geo.* 1. *Ludlam* v. *Bradley*.

* Sir John Strange, the Reporter, was called to the bar about this time.

* Michaelmas Term,

8 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Justice.*

Sir Littleton Powys, *Knt.*
Sir Robert Eyre, *Knt.*
Sir John Fortescue Aland, *Knt.*
} *Justices.*

Sir Robert Raymond, *Knt. Attorney General.*

Sir Philip Yorke, *Knt. Solicitor General.*

Dominus Rex *versus* Inhabitantes de Warminster.

3 & 4 W. & M. c. 11. A person irremovable needed not give notice before 3 & 4 W. & M.

Certiorari to remove an order of two justices may be directed to the sessions, and returned by them.

THE sessions return an order of two justices for the removal of *J. S.* whereby it appeared, that after the statute of *Jac.* 2. *c.* 17. and before the 3 & 4 *W.* & *M.* *c.* 11. *J. S.* had been hired into the parish of *Warminster*, and had lived there as a servant for forty days, which the two justices adjudged had gained him a settlement. And now Mr. *Fazakerley* moved to quash the order, because it did not appear, that *J. S.* had given notice, and the statute of 1 *Jac.* 3. is express, that the forty days are to be accounted from giving notice in writing; and besides the *certiorari* should have gone to the two justices and not to the sessions, because it did not appear any act had been done at sessions, either to confirm or reverse the order. As to this last matter the court held that the order was well returned by the sessions. And Mr. Justice *Eyre* said, it had been so determined already, for the justices are supposed to return all the orders they make to the sessions, where they are to be recorded. And as to the other part of

the

the case, it was held well enough without notice, for the intent of that was only to give the parish an opportunity of sending away persons that were removable; but that is not the case of hired servants or apprentices who are irremovable; so that requiring them to give notice, is requiring them to do a vain thing; for as to themselves it can be of no benefit in making it a better or a stronger settlement; and as to the parish, they can do nothing upon it either to ease or discharge themselves.

Between the Parishes of Chewton *and* Compton Martin.

TWO justices make one order for the removal of two different families; and the sessions, upon appeal, quash the order, for insufficiency. And to maintain the order of sessions, *Reeve* objected to the order of two justices, that though the parishes are the same in both cases, yet the removal of two families by one order is ill: for suppose the removal of one is legal, and the other illegal, and there is an appeal to the sessions as to both; and the order is confirmed as to one, and reversed as to the other; what is to be done in that case as to costs? the statute of 8 & 9 *W.* 3. *c.* 30. giving costs to the parish in whose favour the appeal is determined: and now the appeal will be determined in favour of neither, and of both. It cannot be said that the order is reversed; because it stands good, as to part; and it cannot be said to be confirmed; because it is not held good, as to the whole.

Tho' the parishes are the same, yet different persons cannot be removed by the same order upon independent settlements. 8 & 9 W. 3. c. 30.

Eyre and *Fortescue* Justices were of opinion, that the order was ill; giving this further reason, that the party removed had a right to appeal; for it may be he was removed from his own estate; and then, upon his appeal, it will consequentially draw over the other matter; in which, perhaps, the parties on all sides acquiesce. The Chief Justice said he had not fully considered it: but his two brothers being clear that the order of the two justices was ill; and the counsel for maintenance of that order refusing to refer the whole matter to the judge of assize, he pronounced the rule, "That the order of sessions "should be confirmed."

Vicars *versus* Worth.

THE wife libelled in the spiritual court for words which appeared on the libel to be spoken in *London*: the words were (speaking to the husband) "You are a cuckoldly old 'rogue, and was cuckold by a porter." And against a prohibition *Lut.* 1039. was urged, that the custom of *London* extends

Words tantamount to whore are within the custom of *London*. Post, 545, 555.

 only

only to the word *whore*, and words that only import a woman to be ſo, are not within the cuſtom. *Sed tota curia contra*; for prohibitions have been often granted where the words are tantamount; *Batchelor* v. *Dennis*; *Evans* v. *Jones*, 3 *Annae*, *Paſch.* 1 *Geo. in B. R. Kilburn* v. *Podger*. And in the principal caſe a prohibition was granted.

Dominus Rex *verſus* Caywood.

The *praemunire* clauſe in the bubble act leaves a power in the court to moderate the judgment.
6 Geo. 1. c. 18. § 18, 19.
Ld. Raym. 1361.

THE defendant being convicted upon the late act of Parliament of being the projector of an unlawful undertaking to carry on a trade to the *North Seas*, whereby many of his majeſty's ſubjects had been defrauded of great ſums of money, came now to receive the judgment of the court, which was prayed by Mr. Attorney General upon the ſtatute of *praemunire*; whereupon the counſel for the defendant argued, that the late ſtatute had not tied up the hands of the court from pronouncing any milder ſentence, if any favourable circumſtances could be laid before them, but had left a diſcretionary power in the court to puniſh, as (the words are) for a common nuſance; and if they thought fit, that then the party ſhould likewiſe incur *any* of the pains and penalties ordained by the ſtatute of *praemunire*. And if it ſhould be taken otherwiſe, it could be to no purpoſe, that the firſt clauſe of fining for a common nuſance was inſerted, when the judgment of *praemunire* alone would reach every thing that the party could have, to anſwer any fine.

To this it was anſwered by Mr. Attorney and Solicitor, that the whole judgment in a *praemunire* might ſtand, and yet there might ſtill be ſome uſe for the clauſe about nuſances, where part of the judgment might be to abate the nuſance, and the party convicted may be likewiſe ſet on the pillory or whipped, which is no part of the judgment againſt one convicted upon the ſtatute of *praemunire*. And they ſaid the word *any* in the ſtatute was the ſame as all; if he is to incur *any* of the pains and penalties, that is *every one*.

Paſch. 10 Geo. he was fined 5 *l.* and impriſoned during the King's pleaſure.

Adjournatur. And the laſt day of the term the Chief Juſtice declared the opinion of the court, that they had a diſcretionary power to inflict all, or only ſome, of the penalties of a *praemunire*.

Dominus

Dominus Rex *versus* Mendez. 7 G. c. 29.

A fact committed before the act of grace may be a ground for articles of the peace.

ON exhibiting articles of the peace against the defendant, it was objected by Mr. *Wearg*, that the fact whereon the prosecutor grounds his apprehensions of danger appeared to be committed before the act of grace, and pardoned thereby; and the crime by that being gone, it must be considered as none; and the court never demands security of the peace on a man's swearing he goes in danger of his life, without some fact before the court, that it may appear to be such *qui cadere posset in constantem virum*.

Per curiam: Suppose it was threats only, would not they be ground for articles, tho' they are not punishable? Though it is pardoned, yet it may be instanced for an inducement to believe the defendant a dangerous person. The defendant entered into a recognizance to keep the peace.

Edwards *versus* Carter et al'.

Where the process is against two on a joint cause of action and one only appears, the other must be outlawed before there can be any further proceedings.

THE defendant and another were partners in the trade of a brewer, and the plaintiff supplied them with malt, for which they neglecting to pay, the plaintiff sued out a bill of *Middlesex*, and arrested *Carter*, who at the return of the writ put in bail before a judge; but the other partner could never be taken: whereupon the plaintiff, without taking any notice of the proceedings upon the bill of *Middlesex*, takes out an original against both partners, and outlaws them. And now it was moved, that the outlawry as to *Carter* might be reversed at the plaintiff's expence, because he had proceeded to outlawry against one that was present in court.

Upon the motion the court made a rule to shew cause; and it was such a contempt, that they ordered an attachment. And *Wearg pro quer'* coming to shew cause insisted, the other defendant not appearing upon the bill of *Middlesex*, it was impossible for the plaintiff to go on upon it with effect; and as to taking the original against both, that was necessary, because it was a joint contract. *Sed per curiam*, though you could not proceed on the bill of *Middlesex*, and though it was necessary to join the other, who could not be taken, with the defendant, in the same original, yet you ought not go on to outlawry against him: you should have outlawed one only, and then you might have come and declared

declared upon the original, that *Carter*, together with *A. B.* his late partner *assumpserunt super se*; but the proceeding here is altogether irregular, because the party was in court, and had done every thing in his power to put the plaintiff in a fair way of recovering his debt: he could not appear or file bail for the other partner, because an action would lie against him for doing it without authority. The court ordered the outlawry to be reversed, and the plaintiff to pay costs, on the defendant *Carter*'s appearing to the original, and discharged the attachment part.

Groenhouse *versus* Cleever.

4 & 5 W. & M. c. 21. Where the defendant is in custody the declaration must be delivered to the turnkey and not into the office.

THE defendant being in custody for want of bail, after the second term moved for a *supersedeas* for want of the plaintiff's declaring, which was opposed by Mr. *Reeve*; because though no declaration had been delivered to the turnkey according to 4 & 5 *W.* & *M.* *c.* 21. yet there had been one left in the office in time, and this he said would be enough to prevent the defendant's discharge, though he could not be obliged to plead to it, or let the plaintiff take a regular judgment. And of this opinion was the secondary, who informed the court, that a *supersedeas* is never granted, till the clerk of the declarations has certified there is no declaration against him in the office; which certificate would be useless, if the delivery of a declaration into the office be not sufficient to prevent a discharge upon common bail. But the court upon consideration granted a *supersedeas*, taking the delivery of a declaration to which the defendant was not obliged to plead, and on which the plaintiff could not sign a regular judgment, to be no delivery at all.

Dominus Rex *versus* Jones.

Where a conviction of forcible entry is quashed, the court *must* award restitution.

A Conviction of forcible entry was quashed for the old exception of *mesuagium* sive *tenementum*; but the restitution was opposed, on an affidavit that the party's title (which was by lease) was expired since the conviction. The court said, they had no discretionary power in the case, but were bound to award restitution on quashing the conviction.

Dominus

Dominus Rex *versus* Cleg.

AN order of baftardy was made at feffions, (which was admitted to have original jurifdiction) and Mr. *Denton* objected, that it was not faid the defendant was ever fummoned or appeared, and natural juftice required that he fhould at leaft have an opportunity to defend himfelf.

Where an order of baftardy is made originally at feffions (as it may) Q. If a fummons fhould not be fet out. 8 Mod. 3. S. C. S. P.

C. J. I believe thefe orders made originally at feffions are very rare, the ufual way being to bring the matter before the feffions by way of appeal from the order of two juftices. Now if it fhould be taken, that the order of two juftices will be well enough, without their fhewing a fummons or appearance; yet I think this cafe will fall under a very different confideration. For in the other cafe the party has an opportunity to relieve himfelf by appeal, whereas upon an original order at feffions he can have no opportunity to bring the matter to a farther examination; fo that it is but a lewd woman's going behind his back and fwearing a baftard upon him, by which means the moft innocent man in the world may be condemned. In the cafe of the *Queen* v. *Simpfon*, it was long debated, whether there ought not to have been a perfonal appearance of the deer-ftealer; at laft indeed it was determined, that a fummons was fufficient, but it was never offered to be fupported upon the foot of not fhewing a fummons. So far from it, that exceptions were taken to the manner of the fummons, and the court delivered a fpecial opinion as to them. *Ante*, 44. *Lord Raym.* 1406.

Eyre J. (*abfente Powys*). It not appearing this order was made in the abfence of the party, I think we muft take it to be a regular proceeding. And fo it was held in the cafe of the *King* v. *Peckham*, *Carth.* 406. The court faid, where a fummons was neceffary, they would prefume there was one, unlefs the contrary appeared; for all jurifdictions are prefumed *prima facie* to act according to law.

Fortefcue J. It is certain, that natural juftice requires, that no man fhall be condemned without notice; for which reafon I think the order will be good, becaufe it does not appear to us that he had no notice: are we to fuppofe the feffions have proceeded contrary to right and juftice, and that too in a cafe where they have undoubted jurifdiction? In the cafe of fervants wages the jurifdiction is given only in hufbandry, and yet orders have been held good, where it did not appear the fervice was in hufbandry; for the court faid they would intend it fo, unlefs the contrary appeared. *Salk.* 442.

C. J.

C. J. I do not ſee to what purpoſe we exerciſe a ſuperintendency over all inferior jurisdictions, unleſs it be to inſpect their proceedings, and ſee whether they are regular or not. I have often heard it ſaid, that nothing ſhall be preſumed one way or the other in an inferior jurisdiction. And as to the caſe of wages, it was always wondered at, and in my Lord *Parker's* time it was actually contradicted in the caſe of the *King* v. *Helling*, *ante*, 8. *Adjournatur*. *Trin*. 12 *Geo*. it was moved and confirmed without oppoſition.

Pitt *verſus* Coney.

On error in action *for* bottomree bond there muſt be bail.

THE plaintiff recovered on a bottomree bond, and the defendant brought a writ of error, but put in no bail; and the queſtion was on the words of the ſtatute, which are, *bonds for the payment of money only*. *Et per curiam*, The contingency having happened, this is now in every reſpect a bond for the payment of money only, and therefore there muſt be bail.

9 G.

Between the Pariſhes of Wookey *and* Hinton Blewet.

Where a perſon ſettled in *A*. has an eſtate deſcended to him in *B*. he cannot be ſent thither, though if he was there he would be irremovable.

A Perſon ſettled at *Hinton Blewet* had an eſtate deſcended to him in *Wookey*, whereupon the juſtices ſend him thither as to the place of his laſt ſettlement. *Et per curiam*, The order quaſhed, for it is no ſettlement nor inhabitation, though if he ſhould go thither he could not be removed: it may be a great injury to ſend him away from a good trade in *H*. to perhaps half an acre of land wherein he has but a term.

Between the Pariſhes of Landinaboe *and* Much Birch.

Where a woman with child of a baſtard is removed from *A*. to *B*. and privately returns to *A*. and is there delivered, the ſettlement of the baſtard is in *B*.

ORDER for removal of a female baſtard child from *Landinaboe* to *Much Birch*, wherein the fact is ſtated ſpecially, that *Mary Wells* had been lately removed from the pariſh of *Landinaboe* to *Much Birch* aforeſaid, being the place of her legal ſettlement; and that ſoon after, ſhe of her own accord did ſecretly return to the pariſh of *L*. from which ſhe was removed, and has been there ſince delivered of a female baſtard child, which at the time of her removal ſhe went with: and the juſtices ſend the baſtard to *M*. the ſettlement of the mother.

Fazakerley

Fazakerley moved to quaſh the order, upon the general ground, that a baſtard is ſettled at the place of its birth. Which was oppoſed by *Strange*, who cited *Trin.* 1 *Geo. between the pariſhes of Tottenhoe* and *Newton Longville*, where a baſtard born at *A.* pending an illegal order of removal, was ſent back with the mother upon reverſal, and adjudged that the baſtard ſhould follow the ſettlement of the mother. So is *Salk.* 474, 532. 2 *Bulſt.* 349 *Et per curiam*, (*abſente* C. J.) That caſe will govern this, and therefore the order muſt be confirmed.

N. B. This caſe was never well conſidered, for it went off without any debate, upon the anſwer given by the caſes which I cited, and which ſeem to differ widely from the preſent caſe; for thoſe caſes were all adjudged upon the apparent fraud, in illegally removing a woman big with child of a baſtard; and leſt the pariſh ſhould take advantage by their own wrong: but in the preſent caſe, it is ſtated that ſhe returned of her own accord, which makes it no more than the common caſe of a baſtard born in the pariſh of *A.* when the mother is ſettled in another pariſh; which ſettlement of the mother was never thought to be the ſettlement of the baſtard. And I do not ſee that it makes any difference, that ſhe returned to the pariſh from whence ſhe was removed, any more than if ſhe had rambled into any other pariſh.

Elwood *verſus* Sir Godfrey Kneller.

ON a reference to the maſter, he informed the court, that it was neceſſary one Mr. *Holbech* ſhould attend him: and upon this the court was moved for a rule, which they were very tender of granting at all, but at laſt they made a rule, that he ſhould ſhew cauſe, why he could not attend the maſter.

Rule for one not party to the ſuit to attend the maſter.

Combes *verſus* Blackall.

DEBT upon a bond, *non eſt factum* pleaded, and verdict and judgment *pro quer'*. To a *ſcire facias* on this judgment the defendant pleaded bankruptcy, and that the cauſe of action accrued before: and on the trial it appeared, the bond was given before the bankruptcy, but the judgment was after: and the Judge who tried the cauſe being of opinion againſt the defendant, there was a verdict for the plaintiff. And now in an action of debt upon the judgment, Serjeant *Birch* moved, that the defendant might be diſcharged upon common bail, becauſe

Where the defendant might have pleaded bankruptcy in the firſt action, he ſhall give bail in debt upon the judgment.

the bond, which was the foundation of the demand, was before the bankruptcy. *Sed non allocatur.* For *per curiam*, We can look no farther backward than the judgment, and therefore there must be bail.

Dominus Rex *versus* Lister.

Power of the husband over his wife.
8 Mod. 22.

THE defendant married the lady *Rawlinson*, and they disagreeing, a deed of separation was executed, whereby some part of her fortune was made over to him, and the rest settled for her separate maintenance. In pursuance of this agreement they lived separately for some time, till Mr. *Lister* thought fit to seize on her, as she came out of church, and hurried her away to a remote place, where he kept her under a guard, till her relations found her out, and brought a *habeas corpus*, by virtue of which she came before the court. And all this matter appearing, and that he declared he took her into his power, in order to prevail with her to part with some of her separate maintenance; the Chief Justice declared, and all the rest agreed, that where the wife will make an undue use of her liberty, either by squandering away the husband's estate, or going into lewd company; it is lawful for the husband, in order to preserve his honour and estate, to lay such a wife under a restraint: but where nothing of that appears, he cannot justify the depriving her of her liberty. That there was no colour for what he did in this case, there being a separation by consent. And therefore they discharged the lady from her confinement, and being desired to bind the husband from attempting the like for the future, they refused to do that; but however intimated to him that they should bear a heavy hand over him, if he acted contrary to the declared opinion of the court.

S. P. 1 Bur. Rep. 542.

Smallwood *versus* Vernon.

The charge against the indorsor may be laid *secundum tenorem* of the indorsement, against the drawer *secundum tenorem billae*.

CASE by original in *B. R.* and declares against the defendant as indorsor of a promissory note, and after setting out the note and indorsement, he goes on, that *virtute inde* the defendant became chargeable with the payment of the money *secundum tenorem* of the indorsement. The defendant, upon oyer of the original, pleads in abatement, that the charge against him ought to be according to the tenour of the note, and not of the indorsement. And *Strange pro def.* insisted, that it might be, that the indorsement appointed the money to be paid at a different time from what is mentioned in the note; which are terms that the indorsor cannot lay upon the party who made the note. Suppose the note be payable

le 1 *May*, surely the party to whom it is given cannot say, I point the contents of this note to be paid to *J. S.* upon *April.* Or if he should, yet the other will not be bound to y it till *May*. And if he is charged according to the terms the indorsement, his only remedy must be, to traverse the ing charged otherwise than according to the tenour of the te. And as to the objection, that in counts upon promissory tes there is no occasion to lay any express *assumpsit*, and erefore the whole may be rejected; he answered, that where pleader does not rely upon the first part of the case he kes, but goes on further and alleges other matter, he by that es the other side an opportunity of traversing the last matter; *Lutw.* 108.

Sed per curiam, There is no occasion to pray in aid of that jection here, where the action is against the indorsor; it is e *he* cannot lay a charge upon the giver of the note in a man- r different from the terms of it; but he may charge himself he pleases, for every indorsement is the same as making a w note; and if the note be payable 1 *May*, and the indorse- ent appoints it to be 1 *April*, as to the indorsor this is a pro- issory note payable 1 *April*. If this was an action against the ver of the note, there might be more in the objection. *Re- ndes ouster agard.*

Preston *versus* Lingen.

IN ejectment on the demise of Lord *Coningsby*, the plaintiff moved on the common affidavit of value, for a trial at bar, hich was opposed by the defendants on another affidavit, that ey severally held but small parcels of land by different titles: nd this is putting it in the power of the plaintiff, by joining veral together, to bring the owner of but 5 *l. per ann.* to the r. *Sed per curiam*, There must be a trial at bar, for if the aintiff makes but one title to the whole, he has a right to in them all together. It was moved that the lessor, having ivilege, might name a good plaintiff to be liable to costs; ut the court denied it with some resentment, saying it had en often attempted, and as often refused.

Trial at bar, where grantable.

Anonymous.

ON a motion for an attachment, the Chief Justice declar- ed, that all the Judges (on consideration) had resolved, at the sheriff could not take bail on an attachment, but a uge at his Chamber might.

Sheriff cannot take bail on an attachment.
Pr. Chanc. 331.
Com. Rep. 264. S. P.
Gilb. Eq. Rep. 84. S. P.
Ld. Raym. 723. contra.

Mich. 13 *Geo. Rex* v. *Bentley*. Resolved accordingly.

Cary

Cary *versus* Webster.

At Guildhall, coram Pratt *C. J.*

Where money is paid to the servant and he misapplies it, the party has his remedy against the master or servant at election. Sel. Caf. Evid. 81.

THE defendant was a clerk of the *South-sea* company, and took in the payments on the third subscription: the plaintiff paid him 600*l.* and he by mistake never entered it in the book, but however paid it over to the company. And the Chief Justice ruled, that no action would lie against him. That if he had not paid it over, the plaintiff would have had his option, either to charge him or the company; as in the common case of payment to a goldsmith's servant, who does not carry it to the account of his master, the party has an election to go against either: he may charge the servant, because till the money is paid over the servant receives it to his use; or he may pass by the servant and make his demand upon the master, because the payment to the servant is made in confidence of the credit given him by the master.

Atwood *versus* Dent.

In Middlesex, coram Pratt *C. J.*

The party who excepts to a witness may call him afterwards.

THE plaintiff called a witness, who was set aside upon an exception taken by the defendant. But afterwards the defendant himself thought fit to call him, and then the plaintiff opposed his being examined. But the Chief Justice ordered him to be sworn, for he is a good (nay a better witness) *for* the defendant, though he is not to be admitted against him.

Dickenson et ux' *versus* Davis. Ibid.

In an action *by* husband and wife, the defendant on the general issue shall not be admitted to controvert the marriage. See *ante* 80.

TRESPASS by husband and wife, for an assault on the wife, and on Not guilty the defendant would have given in evidence, that the man had a former wife still living, and then the defendant could not be guilty of such a beating for which the plaintiff was intitled to damages; and Not guilty does not go barely to say I did not beat this woman, but I did not beat the plaintiff's wife. *Sed per Pratt* C. J. I can never allow it: you might have pleaded this in abatement, and then they would have had an opportunity to meet you upon that question; whereas if I was to let you into it now, the honestest couple in the world may be branded for adulterers.

Moody

Moody *versus* Thurston.

At nisi prius *in* Middlesex, coram Pratt *C. J.*

BY the act for stating the debts of the army, the commissioners have power to call the officers and agents before em, and if it appears there is any money due from one to e other, the commissioners are to give the party a certificate, ıd he may maintain an action for the money as upon a stated count. The plaintiff now produced his certificate; and the fendant offered in evidence his accounts, by which he said would appear, he had at that time no money in his hands: ıd besides, the commissioners had never heard him, but on e first summons made the certificate, and refused to give him me to produce his accounts. But the Chief Justice would ot let him into this evidence, being of opinion, that the ertificate was conclusive.

6 G. c. 17. Act of the commissioners for stating the debts of the army, conclusive evidence.

Hil. sequen' on a motion for a new trial they were all of the same opinion.

Dominus Rex *versus* Gray.

At the Old Bailey.

ONE of the servants in the house opened his lady's chamber door (which was fastened with a brass bolt) with degn to commit a rape; and C. J. *King* ruled it to be burglary, ıd the defendant was convicted, and transported.

Burglary. Kel. 30. H. H. P. C. 562. H. P. C. 83. Kelyng 67. Hutt. 20, 33.

Dominus Rex *versus* Vincent et al'. Ibid.

'Ndictment for forging a will relating to personal estate; and on the trial a forgery was proved, but the defendants proıcing a probate, that was held to be conclusive evidence in ıpport of the will.

A will relating to personal estate cannot be said to be forged, after probate granted.

Dominus Rex *versus* Burton. Ibid.

THE defendant came to town in a chaise, and before he got out of it he fired his pistols, which by accident kill- a woman; and *King* C. J. *de C. B.* ruled it to be but anslaughter.

Manslaughter.

Statford *versus* Neale.

Paſ. 3 Geo. rot. 183.

In prohibition the contempt is but form, and the jury need not give any verdict about it. Fortesc. Rep. 350. 8 Mod. 1.

ERROR on attachment *ſur prohibition*, wherein the plaintiff declares, that by the laws of *Ireland* no tithes ought to be paid twice in one year, or for cattle fed with hay whereof tithes have been paid, or for ſtubble, &c. That he was ſeiſed of certain lands for which he had paid tithes, and yet the defendant libelled againſt him, as being rector, and intitled to two thirds of the tithes of certain bullocks and horſes depaſtured upon the land, for which tithes had been paid as aforeſaid; and that he was proceeding againſt him, though he had alleged all this in his defence.

The defendant as to the contempt pleads Not guilty, upon which iſſue is joined; and for a conſultation, that as to two intire parts of the tithes of the agiſtment of thoſe lands he is intitled to them as rector, and therefore libelled; and traverſes, that for all the time aforeſaid the cattle were fed with hay for which tithes had been paid, and only in meadows that had been tithed: upon which iſſue is joined and found with the defendant in the words of the traverſe: on this the King's Bench in *Ireland* award a conſultation, upon which error is brought, and the general errors aſſigned.

Mr. Solicitor General *pro querente in errore* took ſeveral exceptions.

1. That the traverſe to the merits of the ſuggeſtion was immaterial, for it ought to have been to the refuſal of the plea, which is the foundation of ſending the prohibition, and it is not any want of juriſdiction. 2 *Co*. 45. *a*. *Cro*. *El*. 511. The Judge below might have tried whether the beaſts were fed with hay of which tithes had been paid.

If the matter was properly traverſable, yet the traverſe is too narrow; for it is, that during *all* the time they were not ſo fed, and ſo is the verdict, whereas they ſhould have anſwered to every part of the time. 2 *Townſ*. *Jud*. 174. *F*. *N*. *B*. 54.

3. The traverſe is a negative pregnant, that the beaſts were not fed with hay that had paid tithes and only in meadows which had been tithed that year; all in the conjunctive; whereas theſe being ſeveral matters ought to have been ſeparately traverſed. 1 *Roll*. *Abr*. 640. *pl*. 12, 13, 14. *Yelv*. 86. It

amounts

ounts only to saying both facts are not true, but yet one of m may. A negative pregnant is a denial with an insinua- n of another affirmative, as *ne dona pas per le fait* implies a pa- gift. *Cro. Jac.* 505, 560. And this exception goes like- e to the verdict, for that finds both the same way; when if : was true, the plaintiff will be excused. 12 *E.* 4. 6. *Bro.* r 39. And the difference lies between the affirmative and ;ative proposition.

|. There is no verdict as to the issue upon the contempt, ich is a discontinuance. 1 *Roll. Abr.* 801. *pl.* 4. 802. *pl.* 7. d it is not barely an imperfect verdict. 3 *Lev.* 55. Tres- s for a coat and mantle, and a special verdict as to one, l none as to the other; held ill. *Co. Ent.* 459. the prece- it is with the objection.

;. The defendant in his plea does not go for a consultation to every thing in the libel; whereas the consultation is irded generally for the whole. 1 *Book of Judg.* 97. *Ash.*). 2 *Townf. Judg.* 107, 172, 173, 174. *Vid.* 61. 5 *Co.* *Jefferies*'s case.

). After the judgment *quod nil capiat per billam*, there is no *inde fine die.* 1 *Roll. Abr.* 771, 772. *pl.* 26. *Cro. Jac.* 439. *'eb.* 488. 1 *Book of Jud.* 102.

r. The quantity demanded in the plea is uncertain, being two intire parts, but does not say whether thirds or tenths. w that ought to be certain, for the plea is in nature of a int, being a suit for a consultation.

Deshyre Serjeant *contra.* 1. We have followed the words of allegation, as to the refusal of the plea. 2 *Co.* 45. says, it out form, and not traversable.

:. I did not hear the answer.

}. The traverse is in his own words, and we could not di- e them by several traverses.

4. In the case of trespass there never is any verdict as to the *et armis.* 1 *H.* 7. 19. *Salk.* 346. And in the case of *Sum-* r v. *Acton in Scaccario* I took this very exception in trespass, d it was over-ruled; and yet that is in a point material, cause the King is intitled to his fine of 6 *s.* 8 *d.*

5. The general award of a consultation can only go to what covered by the plea.

6. *Eat inde sine die* would not be proper, becaufe ther be another prohibition. Nor is it neceffary here, whe plaintiff claims nothing.

7. The incertainty in the quantity is nothing in the te ral courts: their proceedings below are more loofe than they libel for words *et eis fimil'*: for fuch a fum of m *aut eo circiter*. 2 *Lev*. 193. 2 *Roll. Abr*. 298. 2 *Lev*. 1 *Mod*. 182. Fine for two parts of a manor. 1 *Leon*. And 13 *Co*. 58. explains it that two parts are two thirds, parts three fourths, &c.

Mr. Solicitor General. The cafe of trefpafs is differen there finding the juftification is a denial of the force, but a verdict upon the merits is no denial of the contempt.

C. J. The incertainty of the demand in their procee is no objection in a cafe within their jurifdiction, as to their law is the rule. The refufal of the plea need not b verfed; the materal point being, whether tithes are payal not. I think the traverfe good, in denying it as the pl alleges it, but there does feem to be a difference betwe cafe of a trefpafs and the contempt.

Eyre J. In demurrers the contempt is never anfwere that is but form, and of a modern introduction, it bein courfe before Queen *Elizabeth*'s time to fue out a *fcire quare non fieret breve de confultatione*. *Co. Ent*. 452. 2 C *Archbifhop's cafe*, has no *eat inde fine die*; nor can it be nece becaufe *inde* would refer to the contempt, and that is matter of form.

Fortefcue J. I think the incertainty is no objection, a to the contempt it is but form, and the jury is never ch with it.

Adjournatur. And this term

Reeve pro querente in errore, waiving all the exceptions on the former argument the court inclined had nothi them, mentioned only three, which he infifted on.

1. The praying a confultation for two integral parts, out diftinguifhing whether thirds, fourths, &c.

The plea extends to lands not mentioned in the libel, award a of confultation *in hac parte* goes to the whole; confultation cannot be granted for a matter not in fuit bel

3. But the objection he principally relied upon was, that there was no verdict as to the issue joined upon the contempt. It must be agreed, that if the verdict does not go to all the materal points put in issue, it will be error, 3 *Lev.* 39, 55. (which the court agreed) then the nature of this contempt is to be considered. In a prohibition both parties are actors, the plaintiff for damages, and the defendant for a consultation, and no body can say but the proceeding after a prohibition is a damage, an injury to the plaintiff. 1 *Cro.* 559. 1 *Jon.* 447. 2 *Roll. Abr.* 316, 575. And therefore in 1 *Vent.* 348, 350, 362. 2 *Jon.* 28. a judgment was reversed for want of alleging a *venue* where the proceeding was, and *Jones* cites two precedents, *Pasch.* 3 *Car.* 2. and *Pasch.* 22 *Car.* 2.

Pengelly Serjeant *contra*. When two parts are demanded, it cannot be understood otherwise, than that one only remains. It is allowed in ejectment, 1 *Leon.* 115. 1 *Mod.* 182. 13 *Co.* 58, 59. In fines and *formedons*.

2. The consultation can go only to what lands are comprized in the libel, and therefore *in hac parte* is confined to that; or if it should go farther, yet as it can give no new authority to the court below, it signifies nothing. *Hob.* 119.

3. As to the contempt, every body knows it is but form, and like the case of the *vi et armis* in trespass. 1 *Saund.* 81. *Parl. Ref.* 201. where the cause is determined on a demurrer, there never was any instance of inquiring into the contempt. 1 *Townf. Jud.* 101, 102, 103, 105, 106. *Rast.* 491. 1 *Saund.* 140, 143. *Co. Ent.* 456. *a.* 457. *b.* 467. *a.* *Lutw.* 1072, 1043, 1052. 2 *Townf. Jud.* 172. 2 *Co.* 43. *Cro. Eliz.* 512.

Chief Justice. The general rule laid down is certainly right; that it will be error, if the verdict does not go to all the material parts of the issue: and therefore the question is truly stated, whether this be material or not. Now as to that, consider what is the design of the party's declaring in prohibition; it is only to see whether the court below ought to proceed farther, and not whether they have proceeded; for that is a matter alleged for form sake, that there may be a demand of damages, to give it the requisites of a suit in law; but in fact we all know it is a fiction, for they never proceed after the first motion, and we must take notice of the course of proceeding: besides, if this exception should prevail, it will avoid almost every judgment in prohibition. As to the other two objections, I think there is one answer for both; that upon the whole it appears, the court below ought to proceed upon the libel, and the con-

 sultation

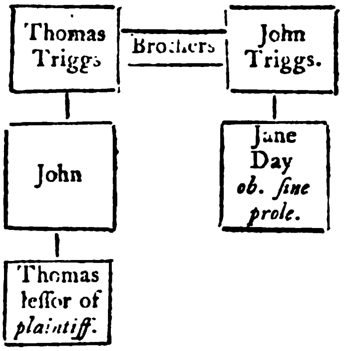
ſultation doth not enlarge their juriſdiction. *Powys* Juſtice *accord.*

Eyre Juſtice. The only point in prohibition is, whether the court below ſhould be admitted to proceed. Formerly this was determined by a *ſcire facias quare non fieret breve de conſultatione*, and then it lay upon the inferior court to ſhew they had a juriſdiction. But in eaſe of them this method of declaring was introduced, and that puts the plaintiff to ſhew, that the court below has no juriſdiction.

The conſultation does not depend on the prayer of the plea, but upon the libel, and is only giving them a power to proceed upon the libel, without any regard to the pleadings upon the declaration. As to the contempt, it is merely fictitious, for does any body think we would not puniſh the judge if he ſhould proceed? The caſe where no *venue* was alleged is widely different, for there the point was tried; and if they do try it, no doubt it muſt be in the ſame manner as all other iſſues are tried.

Forteſcue Juſtice. I do not think *duas partes* are two thirds, they may as well be fifths. But the true anſwer is, that the libel is two thirds. And it matters not what the party prays in his plea. In *Co. Ent.* there is a precedent, where the judgment is *quod fiat conſultatio*, and that the judge ſhall proceed *in iſta cauſa*. The ſame anſwer ſerves for the ſupernumerary lands. As to the contempt, I concur with the reſt, for ſince the precedents are both ways, we muſt adhere to them which tend to ſupport the judgment. The judgment affirmed.

Smith *versus* Triggs.



'N Not guilty in ejectment for copyhold lands in *iddlesex*, a case was made at *Nisi prius* for the opinion ›urt.

A copyholder *ex parte materna* devises to his heir, who dies before admittance: the lands remain descendible to the heir on the part of the mother. 8 Mod. 23.

Hugh Hunt, being seised in fee of the premisses in married *Jane* the widow and relict of *John Triggs* of the plaintiff's great uncle. That after the mar- *igh Hunt* surrendered the premisses to the use of his afterwards devised the same to *Jane* his wife and her d died without issue by her; after whose death *Jane* itted and likewise surrendered to the use of her will, ed the same to *Jane Day* her daughter and heir by her and *John Triggs*, and to her heirs for ever, and soon l. That *Jane Day* before admittance made her will, by gave the premisses to the defendant in the words ;: "*Item* I give and bequeath all my freehold and also ' copyhold estate, *which I intend to surrender to the use my will*, lying in *Edmington* in the county of *Middlesex*, ıy cousin *Thomas Triggs* (the defendant) for and dur- ıe term of his natural life, with remainder over." :r making the will, and before any court day, *Jane* ›r died, having never surrendered to the use of her t the defendant who is the devisee is notwithstanding under the devise.

:ssor of the plaintiff claims the lands as cousin and *ane Day (viz.)* as grandson and heir of *Thomas Triggs*, ther of *John Triggs*, father of the said *Jane Day*. And dant claims under the devise.

Short pro quer' argued, 1. That the devife by *Jane Day* to the defendant is void for want of a furrender to the ufe of her will, and, 2. That the leffor of the plaintiff, who is heir at law to *Jane Day*, is therefore well intitled to the lands whereof no difpofition was made by his anceftor.

1. That the devife is void. The nature of a copyholder appears in 1 *Inft.* 57. *b.* and he is called tenant by copy of court-roll, becaufe all the evidence which he has of his title are the rolls of his lord's court, by which copyholds may be transferred from one to another as effectually, as freeholds may by deed. And he enjoys the method of paffing his eftate by the court-rolls, in lieu of the power which a freeholder has to alien his land by deed; for if a copyholder aliens by deed it is a forfeiture. 4 *Co.* 209. *Litt.* § 74. *Alienare* (fays my Lord *Coke) eft alienum facere*, that is in legal underftanding when the eftate paffes out of one into another, and that cannot be unlefs there appears fome evidence of the right's being changed upon the rolls of the court. A copyhold is not devifable but by cuftom, for the ftatute of *Hen.* 8. of wills relates only to freeholds, and doth not extend to copyholds, fo that a bare devife of a copyhold will not pafs the eftate, as it will of a freehold. *Cro. Car.* 44. And as a copyholder has not fuch power to devife as a freeholder has, fo likewife he cannot exchange his eftate by parol, as a freeholder could for lands in the fame county at common law; but is obliged to

1 Salk. 188. furrender the fame into the hands of his lord, to the ufe of him with whom he exchanges. So is 1 *Bulftr.* 200. 1 *Inft.* 50. *a.*

The law will not fupply a defect in a title againft the heir at law, but will conftrue every thing in his favour; and therefore a furrender to the ufe of this will fhall not be fupplied, fince that will be to the prejudice of the heir at law. *Salk.* 187.

2. The devife being void for want of a furrender, the leffor of the plaintiff has a good title as heir at law to the devifor. And if it be objected to him, that he is not heir on the part of the mother, I anfwer, that thefe lands are not defcendible to the heir of the part of the mother, for though they came to *Jane Day* by her mother, yet the courfe of defcent was altered by the furrender and devife made to her by the mother, under which the lands vefted in her as a purchafer, and not as heir by defcent. That a furrender will alter the courfe of defcent is proved by this, that if there be two jointenants of copyhold lands, and one furrenders to the ufe of his will and dies; by this the jointure is fevered, and the furrenderee is in from the furrender, by which the land is bound. *Co. Litt.* 59. *b.*

3 *Cro.*

Cro. 100. Cro. Eliz. 717. And yet a bare devise would not take away the right of survivorship. So in the case at bar, the surrender and devise was a compleat conveyance to *Jane Day*; and though she died before admittance, yet her heir shall not be prejudiced. 1 *Vent.* 260. 3 *Keb.* 329. 4 *Co.* 22. *b.* *Dy.* 291. *b.* 2 *Sid.* 61, 37. (*Contra Yelv.* 144. *Pop.* 127. that the grantee of such a surrenderee shall not be admitted.)

The course of descent being therefore altered, and the devise to the defendant void, the heir at law of the part of the father has a good title, and therefore he prayed judgment for the plaintiff.

Darnall Serjeant *contra*. Agreed the devise would not pass the estate to the defendant without a surrender to the use of the will; but his possession would be a good title against the lessor of the plaintiff, who must recover upon his own strength. He can have no title as heir to *Jane Day*, because he is not heir of the part of the mother; for as he argued, *Jane Day* took the lands as heir by descent, and not as a purchaser under the devise. And that for these reasons:

1. Because her title by descent is more worthy than one by purchase; and where two rights meet, the elder or worthier is to be preferred. 2. Because the devise was void, being made to the heir, and therefore she shall be adjudged in by descent, which is most for her advantage. 1 *Roll. Abr.* 626. *Salk.* 241, 242. 3. Because admitting the devise was well made to the heir, yet in this case, it is not compleated by her admittance under it, as it ought to be; for before admittance she could be no purchaser, and then the lessor could not be heir to her as a purchaser, because his ancestor was never seised. 1 *Roll. Abr.* 627. *pl.* 9.

Jane therefore took by descent as heir of the part of the mother, and the lessor being only heir of the part of the father can have no title, since the lands remain descendible to the heir *ex parte materna*.

Chief Justice. The devise without a surrender will not pass the estate to the defendant, but his possession will be a good title against the lessor of the plaintiff, if *Jane Day* took as heir by descent: and that she was in as such is plain, because the surrender to her never took effect for want of her admittance, and so she had no good title as a purchaser, but her title by descent was compleat. She had her election of two rights, one vested immediately, and the other not before election, she died before election, and therefore that which vested must take effect: and

and then the courfe of defcent was not altered, and the heir of the part of the father can have no title. *Adjournatur.* And this term,

Devife of a copyhold to the heir is void, and he is in by defcent.

Pratt Chief Juftice delivered the refolution of the court. The cafe in fhort is this. It was the eftate of *Hugh Hunt*, who married *Jane Triggs*, and by furrender and will devifed it to *Jane* and her heirs. *Jane* furrendered it to the ufe of her will, and devifed it to her daughter *Jane Day*, who before admittance devifed it to the defendant, and died without any furrender or admittance.

As to the defendant there is no title in him for want of an admittance of *Jane Day*, and alfo for want of a furrender to the ufe of her will; and therefore the matter refts upon what title the leffor of the plaintiff can make, and if he makes none the defendant muft have judgment.

And the title which the leffor makes is this: fays he, I am the coufin and heir of *Jane Day*, *i. e.* I am the grandfon and heir of *Thomas Triggs*, the elder brother of *John Triggs*, who was her father, and this being a void devife to the defendant, I am intitled to the eftate as heir at law.

And it is true, and is fo ftated in the cafe, that the leffor is heir at law to *Jane Day*, that is on the part of the father; but the objection is, that thefe lands are defcendible to the heir *ex parte materna*; and if they be, then the leffor has no title.

And in order to fee what heir thefe lands are to go to, it is to be confidered under what title *Jane Day* took the eftate, whether fhe was in by purchafe or by defcent: if fhe was in by purchafe, then the leffor muft take them as heir to her; but if fhe took by defcent, he has no title, becaufe he cannot make himfelf of the blood of the firft purchafer *Jane Triggs*, who was afterwards married to *Hunt*. 1 *Inft.* 12. *b.* is exprefs, that he muft be of the blood of the firft purchafer.

And we are all of opinion that *Jane Day* took by defcent, and confequently the lands remain defcendible to the heir *ex parte materna*.

Jane Day was heir at law to her mother, who furrendered the eftate to the ufe of her will, and devifed it to her daughter in fee; that is, fhe gave her fuch an eftate as would have defcended to her without the will.

Confider

Consider it first upon the surrender; that we all know was on, an instrument by which the lord took nothing, and the estate notwithstanding remained in the surrenderor: this is plain from Cro. Eliz. 441. where the tenant made a second surrender, and was adjudged for the second surrenderee, upon the bare surrender; therefore nothing passes, and the lands will descend notwithstanding.

The next thing to be considered is the will. *Quid operatur* that, to prevent the course of descent. And we hold that to be of no force in this case. A devise to the heir is void. 1 *Roll. Abr.* 626. because he has a better and more worthy title by descent. This rule holds as well in the case of copyholds as freeholds. Indeed where the will devises the estate in a different manner from what it would have descended in, it will be good; this is so notorious, that instances will be needless.

If *Jane Day* was to claim by the will, that title was never compleat for want of an admittance. That plainly shews her election to be in of her more worthy title by descent. That was a compleat and a perfect title, but the other was not. And for this the case of *Abbot* v. *Burton* is strong in point, where a man seised in fee of lands which descended to him of the part of the mother, levies a fine to several uses, with a remainder to his own right heirs; and it was resolved, that this remainder was the ancient use, and the heir *ex parte materna* should have it. The case of a feoffment is certainly as strong as a surrender to the use of the will. Salk. 590. 11 Mod. 181.

The daughter therefore taking by descent, and the mother being the first purchaser; the lessor, if he claims any thing, must make himself heir to the mother, which he is not, and consequently the defendant must have judgment.

Hilary

Hilary Term

8 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Justice.*

Sir Littleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Justices.*
Sir John Fortescue Aland, *Knt.*

Sir Robert Raymond, *Knt. Attorney General.*

Sir Philip Yorke, *Knt. Solicitor General.*

Martin *versus* Wyvill.

Q. Whether in B. R. the continuances may be entered *de die in diem*, or only from term to term?

IN *Trinity* term last the plaintiff delivered a declaration upon a stockjobbing contract, with an imparlance to *Michaelmas* term, and then upon a demurrer to the replication the book is made up, and after the first of *November* it was made a *concilium*, and the plaintiff had judgment *nisi* before the end of the term; and the day before the end of the term that rule is discharged, and an *ulterius concilium* to this term; at the first return of which the defendant comes in and pleads as *puis darrein continuance*, that the contract is not registered according to the act of Parliament: whereupon the plaintiff makes a special entry of the continuances from the first day of *Michaelmas* term to that day when it stood in the paper, and so on to the last day of last term, and then again to the first day of this term. And now *Wearg* moved to set aside the plea, because not pleaded after the last continuance, the time for registering expiring the first of *November*, after which there are two continuances upon the roll before the plea comes in, whereas all pleas *puis darrein continuance*

tinuance ſhould be pleaded before the next continuance after the act happens; and as to the ſpecial entry here made, he ſaid that indeed the common practice is only to enter continuances from term to term, becauſe that being ſufficient to prevent a diſcontinuance, the attornies for their own eaſe never enter any more; but yet in fact the party has a right to enter all the continuances, the proceedings here being *de die in diem*. Beſides the plea is falſe in fact, and that is another reaſon to ſet aſide a dilatory; the words of the act are, "That ſuch memorial ſhall be ſigned by the party," and it is upon that they ground themſelves, for the contract is regiſtered, and in this manner, "This contract was made for the benefit of me *William Martin*, and has not been compounded;" which being all the plaintiff's hand writing, that is a ſigning, though the name is not at the bottom. Like the caſe of a will, which the teſtator writes himſelf, and begins I *A. B. &c.* and does not ſubſcribe it, yet that has been adjudged to be a ſigning. 3 *Lev.* 1. A will written by the teſtator himſelf needs no ſigning.

As to the point of the continuances the court did not determine that matter: the C. J. and *Forteſcue* J. inclined that as the act would warrant it, every act of the court might be entered, and then the plea muſt be ſet aſide, as not coming in time; but *Eyre* J. (*abſente Powys* J.) thought this uncommon entry, which was to deprive the defendant of a benefit, which in the common courſe of practice he would be intitled to, ought not to be allowed; however they did not determine this point, being all of opinion, that for the ſecond reaſon the plea ſhould be ſet aſide as falſe, ſaying it was conſtant experience at the aſſizes, to put the party to verify ſuch a plea, before it is allowed, and if the party does not give ſome evidence of the truth of it, the Judge will reject it and go on with the cauſe. And at another day *Eyre* J. cited *Mo.* 871. that a plea *puis darrein continuance* could not be pleaded after a demurrer. The others gave no opinion as to this, but ſet it aſide upon the point of its being falſe in fact, without meddling farther with the continuances.

Where a plea *puis darrein continuance* is put in, the court will immediately require ſome evidence of the truth of it.
Vide Hob. 81. *contra*.

Colborne *verſus* Stockdale.

9 Ann. c. 14.

DEBT upon a bond conditioned for the payment of 1550 *l.* The defendant upon *oyer* pleads in bar, that part of the ſum mentioned in the condition, *ſcilicet* 1500 *l.* was won by gaming, contrary to the ſtatute, *per quod* the bond became void. The plaintiff replies, that the bond was given for a juſt debt, and traverſes that the 1500 *l.* was won by gaming, *contra formam ſtatuti modo et forma*, as the defendant has pleaded. The defendant demurs, and

The replication will be ill, if it makes an immaterial part of the plea parcel of the iſſue.
8 Mod. 57.

Strange

Strange pro def. argued, that the replication was ill, because it makes the ſum parcel of the iſſue, and obliges the defendant to prove, that the whole ſum of 1500*l.* was won by gaming; whereas the ſtatute avoids the bond, if any part of the conſideration became due on that account; and he urged the common caſe of a plea of payment *before* the day, where if iſſue is joined, and a verdict *pro quer'*, there ſhall be a repleader, becauſe it leaves it open to a poſſibility, that there might be a payment *at* the day, and then the plaintiff could have no cauſe of action: ſo in this caſe the finding that the whole ſum of 1500*l.* was not won by gaming will not *toll* the preſumption as to a leſs ſum. Beſides the ſum is put in only for form, and therefore within the reaſon of the caſe of *Stallard* v. *Tims*, the replication will be ill, for making it the ſubſtance of the iſſue.

Wearg contra inſiſted, that the replication following the words of the plea, would be well enough; and cited *Dy.* 365. *pl.* 1. for that purpoſe. *Sed per curiam*, There is no colour to maintain the replication: the material part of the plea is, that part of the money for which the bond was given was won by gaming and the *ſcilicet, ſo much*, is only matter of form, of which no notice ſhould be taken in the replication.

Wearg, then admitting the replication to be ill, ſo is their plea, and then the declaration muſt ſtand, and the plaintiff have judgment.

For this, my exceptions are, 1. That the words of the ſtatute are not purſued: the ſtatute ſays, the bond ſhall be void where it is given for money won by gaming, whereas the plea is, that the money for which the bond was given was won by gaming, and though in fact that may be the ſame, yet the very words of the ſtatute ſhould be purſued. *Sed per curiam*, It amounts to the ſame thing, and is good to a common intent.

2. The ſtatute only avoids bonds given after the firſt of *May* 1711, and therefore the defendant ſhould ſhew this to be ſo; and the time in the declaration (3d of *September* 1720.) will not be ſufficient, becauſe the bond may be given at a different time from what it bears date.

That which appears in the plaintiff's declaration need not be averred in the plea.

Strange. The time is not mentioned as the date of the bond, but that ſuch a day the defendant *conceſſit ſe teneri*, which relates to the execution of it; and therefore it appearing upon the whole record to be ſince the ſtatute, it is the ſame as if it had

l been in the words of the plea. *Et per curiam,* The anfwer right, and there is nothing in that objection.

3. The main objection he infifted on was, that it is not ;wn at what play or game the money was loft, and that ought appear to the court, that they may judge, whether it was :h gaming as is contrary to the ftatute: fome people call ckjobbing gaming, and yet if it had appeared to the court, t there was no more in the cafe, they would not have de- mined it to be a gaming within this act of Parliament.

Where the defendant pleads that the bond was given for money won by gaming, he muft fhew what game they played at.

It may be faid that concluding *contra formam ftatuti* is an aver- nt that it was at fuch a game as is contrary to the ftatute, l then what game, is not material, but the cafe in *Dy.* 363. ı full anfwer to that, for *contra formam ftatuti* being only the :rence of the party, muft be fupported by premiffes, or it ıds for nothing.

Strange contra. I fhall endeavour to anfwer this, by fhewing, That it is not neceffary to mention the game, and 2. That : be, the words of the plea are fufficient.

. As to the firft, there might be fome colour for the ob- ion, if the ftatute had only made it penal to play at fome ticular games, but here are added the general words, *other e or games*; fo that it can anfwer no purpofe whatfoever to ticularize the game, becaufe the bond may be void, and yet money not be loft at any one of the games enumerated in ftatute. The fact of gaming is all that need be alleged, mode and manner of it is only matter of evidence, of which jury are judges; and fo it was faid in the cafe of *Groenvelt Burwell, Trin.* 12 *W.* 3. *B. R.* where, in trefpafs, the college hyficians juftified under a conviction *pro mala praxi* in ad- iiftring unwholfome pills and drugs, whereby a woman l; and it was held by the court, that if the matter of the viction was traverfable, even then the fact was fufficiently ged, without fetting out what the drugs were, becaufe that matter of evidence.

t is likewife confiderable, whether obliging the defendant to ıtion the game, may not be a hardfhip; for though he may ıble to prove in general, that he loft fo much money at un- ful games, it may be impoffible for him to diftinguifh how ch was loft at hazard, and how much at picquet.

2. Admitting it neceffary to be particular, the plea is fuf- ent; for if the ftatute avoids the bond where it is given for ney loft at gaming, then the words of the plea, that the bond

bond was given for money won by gaming contrary to the statute, are an averment that it was such gaming as is contrary to the statute. 1 *Sid.* 337. the plaintiff maintained his action on a promise made by the defendant *ut* administrator, and that was held an averment of his being so.

Besides, this general way of pleading, that the money was lost by gaming *contra formam statuti* is agreeable to the entries where offenses against acts of Parliament are alleged. *Co. Ent.* 46. *a. Rast. Maintenance.*

C. J. I think the game ought to be mentioned in the plea, for it is matter of law, and not barely evidence; and the saying in general that it was *contra formam statuti* will not be sufficient. *Et per Eyre* J. It is like the case of an usurious or simoniacal contract, where the agreement itself must be shewn; and so it is likewise upon the statute of *Edw.* 6. against the sale of offices, where the particulars of the contract must be expressed. *Et per Fortescue* J. In *Lutw.* 180. *Clift* 187. the game is mentioned. The plaintiff had judgment.

Cary *versus* Jenkings.

Double plea.

IN debt for rent *Strange* moved for leave to plead a tender and eviction, which was granted.

Dominus Rex *versus* Filer.

5 Ann. c. 14. Conviction for *keeping* (only) a lurcher good.

COnviction on 5 *Ann. c.* 14. for keeping a lurcher to destroy game, not being qualified.

Mr. *Eyre* excepted, that it is not shewn he made use of the dog to destroy game; and it may be he only kept it for a gentleman who was qualified, it being common to put out dogs in that manner.

Sed per curiam, The statute 5 *Ann. c.* 14. is in the disjunctive *keep or use*, so that the bare keeping a lurcher is an offense, and so it was determined in the case of the *King* against *King*, *Pas.* 3 *Geo. B. R.* which was a conviction for keeping a gun, and it was not doubted by the court, whether the keeping was not enough to be shewn, but the only question they made was, whether a gun was such an engine as is within that statute; and in that case a difference was taken as to keeping a dog which could only be to destroy the game, and the keeping a gun, which a man might do for the defence of his house. The conviction was confirmed.

Dominus

Dominus Rex *verſus* Gibbs.

ictment againſt the defendant for ſelling *diverſas quantitates* *rviſiae lupulatae (Anglice* beer) *diverſis fidel' ſubdit' Domini* to the jury unknown, in unlawful meaſures; and on de- er,

Indictment for ſelling divers quantities of beer is too general. cited in Andrews 175. Seſſ. Caſ. 263

zakerley excepted, that it is not ſaid to whom the beer was and *Sti.* 186. an indictment quaſhed for that exception, iſe the defendant, if he ſhould be convicted, can never it in bar to a new indictment. *Sed per curiam*, It is well gh, the informer may not know the name of the perſon to n it was ſold; it is an offenſe, let it be ſold to whom it d: indictment for the murder of a perſon unknown is

cond exception. That *diverſas quantitates* is too general, and court cannot form a judgment in what degree to puniſh *Cro. Car.* 380. 2 *Roll. Abr.* 80. *pl.* 14. 81. *pl.* 15, 16, *Et per curiam*, For this fault the indictment muſt be ied.

Adams *verſus* Verells.

7 G. 1. Seſſ. 2. c. 1.

N a motion for common bail, it appeared to be a borrowing of ſtock, and a promiſe to transfer the ſame quantity future day. *Et per curiam*, There muſt be bail, for this lending, and therefore not within the *act*, which ſpeaks of contracts for the ſale or purchaſe of ſtock.

Borrowing of ſtock not within the ſuſpending act.

Dominus Rex *verſus* Sparling.

7 W. 3. c. 11.

Onviction for profane curſing and ſwearing ſets forth, that one *William Collier* came before the juſtice, and gave in- ation, that one *James Sparling* of the pariſh of *St. James* *enwell*, leather dreſſer, did within ten days laſt paſt pro- y ſwear 54 oaths, and profanely curſe 160 curſes, *contra* *m ſtatuti*; and the witneſs being ſworn did depoſe, the de- nt ſwore 54 oaths and 160 curſes, and the defendant be- ummoned and heard, the juſtice adjudged him to be guilty e premiſſes, and to forfeit 21 *l.* 8 *s.*

In a conviction for ſwearing and curſing, the oaths and curſes muſt be ſet out. See 19 Geo. 2. c. 21. 8 Mod. 59. Seſſ. Caſ. 263. pl. 207. See 2 L. Raym. 1368. S. P.

erjeant *Darnell* moved to quaſh the conviction, becauſe the lty is at the rate of 2 *s.* *per* oath, whereas the ſtatute 6 & 7 3. *c.* 11. lays the penalty at 1 *s.* only where the offender is a

Muſt ſhew the defendant not a ſervant if ad- [illegible]

 ſervant,

ſervant, labourer, common ſoldier, or ſeaman, and therefore it ſhould be ſhewn that the defendant is not ſuch a perſon.

Baines contra. It appears by his addition that he is a leather-dreſſer. *Sed per curiam*: That is not enough, he may be ſo, and yet he may likewiſe be a ſoldier or ſeaman: in convictions for deſtroying the game, it muſt be ſhewn, that the defendant is not qualified, becauſe otherwiſe the juſtices have no juriſdiction. So here to give the juſtice a power to adjudge the forfeiture at the rate of 2*s.* it muſt appear, that the defendant is not ſuch a perſon upon whom a leſs penalty is inflicted by the ſtatute.

See Say. Rep. 304. Burn's Juſt. 466.

And the court held the conviction naught for another exception, that the oaths and curſes were not ſet forth; for what is a profane oath or curſe is a matter of law, and ought not to be left to the judgment of the witneſs: he may think falſe evidence is ſo: ſuppoſe it was for ſeditious or blaſphemous words, muſt not the words themſelves be ſet out, be they ever ſo bad, that the court may judge whether they are ſeditious or blaſphemous? the witneſs here takes upon himſelf to ſwear the law, and it is a matter of great diſpute amongſt the learned, what are oaths, and what curſes: the caſe of *Colborne* v. *Stockdale* is freſh in every body's memory, where we held the particular game ought to be ſet out, becauſe what is gaming is a matter of law. *Ante*, 493. The conviction was quaſhed.

Lord Bernard *verſus* Saul.

On *non aſſumpſit* an uſurious contract may be given in evidence. Forteſc. Rep. 336.

ON a motion for leave to plead double, the court declared, that on *non aſſumpſit* the defendant might give in evidence an uſurious contract, becauſe that makes it a void promiſe; but in the caſe of a ſpecialty, it muſt be pleaded. And on the trial the defendant was admitted to that evidence upon the general iſſue, and the plaintiff was nonſuit.

Dominus Rex *verſus* Bickerton.

If a libel be true it will be an inducement to *B. R.* to leave the ſame to a grand jury. *Mich.* 9 *Geo.* *Rex* v. *Bebarrel*, an information for a libel upon the cornfactors at *Bear-key* denied for the ſame reaſon. 3 Bac. Abr. 475.

ON a motion for an information for a libel in advertiſing that one *Madox* an apothecary had perſonated Dr. *Crow* a phyſician, and wrote and took his fee (which the apothecary did not pretend to deny) the Chief Juſtice declared, that though truth be no juſtification for a libel, as it is for defamatory words, yet it will be ſufficient cauſe to prevent the interpoſition of the

court

court in this extraordinary manner, and induce them to leave it to the ordinary courſe of juſtice before a grand jury. Whereupon the rule for an information was diſchaged.

Jewell *verſus* Hill.

IN the borough court after notice of trial the parties agreed to refer the cauſe, and during the reference the plaintiff, without new notice, went on to trial and had a verdict: which the judge afterwards ſet aſide. And upon mo ion againſt him the court declared, that the judge of an inferior court might ſet aſide ſuch a verdict, upon the foot of irregularity.

Judge of an inferior court may ſet aſide a verdict for irregularity.

S. P. ſettled *accord.* ante, 392.

Dominus Rex *verſus* Reaſon and Tranter.

THE defendants being indicted by the grand jury that attends the court of *B. R.* for the murder of Mr. *Lutterell*, were brought up to the bar and arraigned, and pleaded Not guilty; and upon their requeſt were remanded to *Newgate*, inſtead of being turned over to the marſhal.

Manſlaughter, *vid.* 6 St. Tr. 195. but ſee and *note* Foſter's Rep. &c. p. 292.

Upon the trial (which was at bar) we who were counſel for the King offered to give in evidence ſeveral declarations made by the deceaſed on his death-bed, whereby he charged the defendants with barbarouſly murdering him, and without much heſitation the court let us into that evidence. Whereupon we called a clergyman who attended him, and he ſwore that being deſired by ſome friends of the defendants to preſs Mr. *Lutterell* to declare what provocation he had given the defendants to uſe him in that manner; he declared upon his ſalvation, that as he was a dying man he gave them no provocation, but they barbarouſly murdered him: that in the afternoon of the ſame day, two juſtices of the peace being preſent, and having given him his oath, he made another and more particular declaration to that purpoſe, which the witneſs at the deſire of the juſtices took down in writing, but Mr. *Lutterell* not being able to write, it was not ſigned by him, and therefore we did not deliver it in. And the ſame witneſs proved, that upon his adminiſtring the ſacrament to him, he exhorted him in the moſt proper manner to deal ingenuouſly, and declare once more, whether there was no provocation given by him, and whether he would ſtand by the account he had before given; upon which the deceaſed anſwered, that as he hoped to be judged at the laſt day, it was every ſyllable true, and ſoon after expired.

When this gentleman had finiſhed his evidence, the court called upon us to produce the paper that had been written from the mouth of the deceaſed, ſaying that was better evidence than the memory of the witneſs; whereupon we acquainted the court, that we had not the original, it being in the cuſtody of one of the juſtices, whom going to *ſubpœna* we found he was in *Wales*; but the clergyman ſaid he had a copy of it, which he took for his own ſatisfaction, before he delivered in the original to the coroner, and he offered to ſwear this to be a true copy.

Whereupon a debate aroſe, whether this copy was evidence or not: we who were for the King inſiſting, that the firſt paper being only the writing of the witneſs, not ſigned by the examinant, this which he now produced, was as much an original as that. But the court refuſed to let it be read, unleſs we could ſhew the original was loſt, whereas it appeared we might have had it to produce, if we had ſent after it in time.

It was then objected by the Chief Juſtice, that ſince the written evidence was not produced, the whole evidence of the deceaſed's declarations ought to be rejected, for the firſt, ſecond and third being all to the ſame effect, are but one fact, of which the beſt evidence was not produced; and therefore he was of opinion, that we could not be let in to give any account of the firſt and third conference.

But the other judges were of opinion we might, ſaying they were three diſtinct facts, and there was no reaſon to exclude the evidence as to the firſt and third declaration, merely becauſe we were diſabled to give an account of the ſecond.

Thereupon the witneſs was directed to repeat his evidence, laying the examination before the juſtices out of the caſe, which he did accordingly.

And upon the whole evidence the fact (upon which the queſtion of law aroſe) was this:

The defendants were officers of the ſheriff of *Middleſex*, and had a warrant to arreſt Mr. *Lutterell* for 10 *l.* they arreſted him coming out of his lodgings, whereupon he deſired them to go back with him to his lodgings, and he would pay the money. They complied with this, and *Reaſon* went up with him into the dining-room, having ſent *Tranter* to the attorney's for a bill of the charges. Whilſt *Reaſon* and the deceaſed continued together, ſome words paſſed between them in

in relation to civility-money, which Mr. *Lutterell* refused to give, and thereupon went up another pair of stairs to order his lady to tell out the money, and then returned to *Reason* with two pistols in his breast, which upon the importunity of the maid he laid down upon the table, and retired to the fire which was at the other end of the room, declaring he did not design to hurt the defendants, but he would not be ill used.

By this time *Tranter* returned from the attorney's with the bill, and being let in by the boy went directly up stairs to his partner, being followed by the boy, who swore, that as he was upon the stairs (*Tranter* being that minute gone into the dining-room) he heard a blow given but could not tell by whom, and thereupon hastening into the room he found *Tranter* had run the deceased up against the closet door, and *Reason* with his sword stabbing him. Mr. *Lutterell* soon sunk down upon the ground, and begged for mercy; but *Reason* standing over him continued to stab him, till he had wounded him in nine places.

By this time the maid came in, and seeing her master in that posture, she and the boy run out for help, and immediately heard one of the pistols go off, and presently after the second, which a woman looking out at window on the other side the way proved to be fired by *Reason*; and several people upon the alarm of the maid coming into the room found Mr. *Lutterell* upon the ground where the maid left him, without any sword or pistol near him.

Upon the defendant's evidence it appeared, that Mr. *Lutterell* had a walking-cane in his hand, and that *Tranter* had a scratch on his forehead, which might be probably a blow with the cane, and the blow heard by the boy upon *Tranter*'s first going into the room. And one of the surgeons deposed, that the deceased had made such declarations to the clergyman, but this witness afterwards being alone with Mr. *Lutterell* pressed him very earnestly to discover the truth, upon which Mr. *Lutterell* did say, that he believed he might strike one of them with his cane, before they run him through.

Upon this the question arose; whether Mr. *Lutterell*'s striking one of the bailiffs first would reduce the subsequent killing to be manslaughter only?

For the King it was argued, that notwithstanding such stroke the defendants would be guilty of murder, that not being a sufficient provocation for giving the death's wound with the pistol: and for this *Holloway*'s case, *Cro. Car.* 139. and *Kelying* 127. were cited, where the woodward finding a boy in the park who came to steal wood, tied him to a horse's tail in

order to correct him, the horse run away and the boy was killed: and this was adjudged to be murder, because the tying him to the horse's tail being an act of cruelty, for which no sufficient provocation had been given, he was answerable for all the consequences of it.

The defendants insisted, that the bringing down the pistols was a sufficient alarm to them to be upon their guard; and then when he struck one of them, it was reasonable for them to apprehend themselves to be in danger; and in such case a prudent man would not leave it any longer in the power of his adversary to do him any further mischief.

To this it was answered by the counsel for the King, that if Mr. *Lutterell* had continued to keep the pistols in his bosom, there might be some colour for an apprehension of danger; but the contrary appearing, *viz.* that he was at a distance from the pistols, with the defendants between him and them; they had no ground to fear any harm upon that account: and the death's wound was given after Mr. *Lutterell* was fallen down with the wounds he had received with the sword, and was intirely in the power of the defendants: so that what they did afterwards was murder in them, because it exceeded the bounds of self-preservation.

But the court in the direction of the jury did positively declare, that if they believed, Mr. *Lutterell* made the first assault upon the bailiffs, the killing with the pistol after he was down would be but manslaughter; and the jury upon that direction found them guilty of manslaughter only, though otherwise they were disposed to have hanged them for the barbarity of the fact.

See 5 Burr. Rep. 2798. *post*, 553.

The defendants prayed the benefit of the statute, and were burnt in the hand.

Between the Parishes of Cranly *and* St. Mary Guilford.

A lease at will gains a settlement.

UPON a special order of sessions it was stated, that a certificate-man agreed with the lessee of a mill, that he should occupy the mill, and pay 12*l.* *per annum*; that there was no under-lease or assignment, but in pursuance of that agreement the certificate-man occupied the mill two years, and paid the rent. The sessions adjudge it no settlement.

Et per curiam, The order must be quashed: for if this is not an absolute lease for a year (as *Eyre* J. said it was, the re-

2 be-

ing reserved as the rent for a year) yet it is undoubtedly a ſe at will, which is ſufficient to gain a ſettlement.

Dominus Rex *verſus* England.

TWO orders of baſtardy were returned, one made by two juſtices, and another original order made at ſeſſions; and ow both were quaſhed. The order of two juſtices, becauſe e ſex of the baſtard, or the name of it, were not mentioned, nly a certain baſtard child born of the body of *A.* and the order f ſeſſions, becauſe there being an order of two juſtices before, e ſeſſions had no juriſdiction but upon appeal. Seſſ. Caſ. 294.

Gilbert *verſus* Bath.

PER *curiam*, According to 1 *Saund.* 291. If the defendant in debt upon a bond would take advantage of another's eing jointly bound, he muſt plead it in abatement, and cannot emur upon *oyer*: for if he does, the court will preſume the her did not ſeal it. That another was jointly bound muſt be in abatement.

There was a demurrer here, and the plaintiff had judgment.

Anonymous.

A Priſoner taken on an eſcape warrant moved to ſuperſede it, on producing a day rule for that day. But the court efuſed a *ſuperſedeas*, becauſe it appeared he went out early in he morning, and did not ſign the petition till he was taken up. Though Sir *Thomas Tipping*'s caſe was urged, where he ſigned the petition in the morning, and went out before the court ſat; and they held, that being intitled to a rule, that rule would protect him the whole day, and they could make no fraction of a day. A priſoner muſt ſign the petition for a day rule before he goes at large.

Gardener *verſus* Walker et ux'. In Canc.

AN executor brought his bill for the direction of the court touching the payment of a conſiderable legacy left by his eſtator to the defendant's wife, who was his daughter; and inſiſted to have the ſame put out for the benefit of the wife and er iſſue, and likewiſe for an injunction againſt the defendant's proceeding in the ſpiritual court in a ſuit there inſtituted for he legacy. Chancery will order a legacy to a wife to be put out for her uſe where the bill is by the executor. Ab. Ca. Eq. 64.

On the hearing the defendant insisted, that he having commenced his suit in a proper court, ought not to be injoined; or if he ought, yet there could be no reason to direct the money to be put out as insisted on by the bill, it having been never done but in cases where the husband has brought the bill to compel the executor to pay the money; and no precedent was produced, where such directions had been given upon a bill brought by the trustee.

Et per Macclesfield Lord Chancellor, Then it is time to make one; can the difference, who is plaintiff in equity, alter the reason of the thing? If it should, it will but be for the husband, instead of coming here, to go into the spiritual court, (as to be sure he will) and so get the whole into his power. There must be the usual direction, that the money may be disposed of for the benefit of the wife.

Williams *versus* Johnson.

At nisi prius *in* Middlesex, coram King *C. J.* de C. B.

Wife witness to prove goods delivered on husband's credit.

THE plaintiff brought his action against the daughter's husband for her wedding cloaths; and the defence was, that the goods were furnished on the credit of the father; and to prove this the mother who was present at the chusing the goods was called to charge her husband, and allowed.

Clark *versus* Tyson.

At Guildhall, coram Pratt *C. J.*

Tender of stock, how to be proved.

UPON an issue whether stock was tendered at the day, the plaintiff proved, that though the books were not open to make transfers in the common form, yet they were ready at the office, and upon leave from a director there might have been a transfer, it not being usual to deny it on such occasions; but the defendant not attending to accept the stock, the plaintiff contented himself with staying there all day, and did not actually get leave from a director to have the books opened if the defendant should come. And for this omission the Chief Justice ruled it not to be a sufficient tender, for there was a possibility that leave might not be given, and the plaintiff had not done every thing in his power: he ought to have prepared matters so, that if the defendant had appeared, there might have been a transfer immediately.

Mead

Mead *verſus* Hamond. Ibid.

THE plaintiff according to the common courſe of dealing delivered to the defendant's ſervant an ingot of gold to ſay; and it not being returned, he brought trover againſt the aſter. And the Chief Juſtice directed the jury, that the delivery the ſervant was ſufficient to maintain the action againſt the aſter, on proving a ſubſequent demand and refuſal; ſo the aintiff had a verdict.

Trover lies againſt maſter for goods delivered to the apprentice.

Sel. Caſ. Evid. 89.

Armory *verſus* Delamirie.

In Middleſex, coram Pratt *C. J.*

THE plaintiff being a chimney ſweeper's boy found a jewel and carried it to the defendant's ſhop (who was a gold-ith) to know what it was, and delivered it into the hands of e apprentice, who, under pretence of weighing it, took out e ſtones, and calling to the maſter to let him know it came to ree halfpence, the maſter offered the boy the money, who re-ſed to take it, and inſiſted to have the thing again; whereup-ı the apprentice delivered him back the ſocket without the ones. And now in trover againſt the maſter theſe points 'ere ruled:

Finder of a jewel may maintain trover.

1. That the finder of a jewel, though he does not by ſuch nding acquire an abſolute property or ownerſhip, yet he has ıch a property as will enable him to keep it againſt all but the ightful owner, and conſequently may maintain trover.

2. That the action well lay againſt the maſter, who gives a redit to his apprentice, and is anſwerable for his neglect.

3. As to the value of the jewel ſeveral of the trade were ex-mined to prove what a jewel of the fineſt water that would fit he ſocket would be worth; and the Chief Juſtice directed the ury, that unleſs the defendant did produce the jewel, and ſhew it ıot to be of the fineſt water, they ſhould preſume the ſtrongeſt gainſt him, and make the value of the beſt jewels the meaſure f their damages: which they accordingly did.

Towers

Towers *verſus* Sir John Oſborne.

At Guildhall, coram Pratt *C. J.*

Executory contracts for goods, not within the ſtatute of frauds. See 4 Bur. Rep. 2101. Black. Rep. 602.

THE defendant beſpoke a chariot, and when it was made refuſed to take it; and in an action for the value, it was objected, that they ſhould prove ſomething given in earneſt, or a note in writing, ſince there was no delivery of any part of the goods. But the Chief Juſtice ruled this not to be a caſe within the ſtatute of frauds, which relates only to contracts for the actual ſale of goods, where the buyer is immediately anſwerable, without time given him by ſpecial agreement, and the ſeller is to deliver the goods immediately.

Dennifon *verſus* Spurling.

In Middleſex, coram Pratt *C. J.*

Wife of *prochein amy*, a witneſs.

IN an action by an infant, I called the wife of the *prochein amy*, and the Chief Juſtice allowed her to be a good witneſs. But the next day in *C. B.* between

Clutterbuck *and* Lord Huntingtower.

Guardian on record, not.

I Called the defendant's guardian upon record, and Chief Juſtice *King* would not allow him. So note an authority on both ſides of the queſtion.

Hazard *verſus* Treadwell. Ibid.

Where the maſter has once paid for goods delivered to the ſervant on truſt, the tradeſman may truſt him after. Sel. Caſ. Evid. 92.

THE defendant who was a conſiderable dealer in iron, and known to the plaintiff as ſuch, though they had never dealt together before, ſent a waterman to the plaintiff for iron on truſt, and paid for it afterwards. He ſent the ſame waterman a ſecond time with ready money, who received the goods, but did not pay for them; and the Chief Juſtice ruled the ſending him upon truſt the firſt time and paying for the goods, was giving him credit, ſo as to charge the defendant upon the ſecond contract.

Snow *versus* Como. Ibid.

HERE was a demurrer to one count, and an issue on the other, and the *venire* was awarded, as well to try issue as to assess contingent damages upon the demurrer. plaintiff was nonsuit upon the issue; and the Chief Justice not go on to assess the damages, saying he had no power do, the plaintiff being out of court.
Where the plaintiff is nonsuit on the issue, contingent damages on the demurrer shall not be assessed.

Brownson *versus* Avery. Ibid.

Sells goods to *B.* and afterwards *C.* desires *D.* to pay *A.* and promises to repay him; *D.* pays *A.* and afterwards *B.* the money to *D.* on account; and in an action against called *B.* to prove the account, (it amounting to payment). it was objected, that the contract being originally only en *A.* and *B.* *B.* was still liable to *A.* and was therefore ing to discharge himself; but the Chief Justice said he allow him to be a witness to prove the payment as a ser- o *C.*
Original debtor taken as a servant to prove the payment by another.

Shuttleworth *versus* Bravo. Ibid.

the bankruptcy act it is provided, that if the bankrupt has within one year before lost 5 *l.* in one day at gaming, ill not have his certificate, nor the usual allowance: and an issue out of Chancery to try the point of gaming, a or of the bankrupt was called, to prove the gaming: but hief Justice would not allow him to be a witness, because uld be intitled to a share out of the usual allowance to ankrupt, which if he has not by having forfeited it on nt of gaming, the dividend to the creditors will be the .
Creditor of bankrupt no witness to prove him a gamester.
Post, 650. S. C. cited.

Johnson *versus* Wollyer.

At Guildhall, coram Pratt *C. J.*

EPLEVIN in *London*, defendant appears upon an *elongata*, plaintiff declares for taking guns *in quodam loco vocat'* the *ries* in *London*; defendant pleaded *non cepit modo et forma.* e trial the plaintiff proved the taking at *Rotherhithe* in ; upon which it was objected, that the plaintiff had not proved
Where in replevin the place is material.

proved his iſſue, for the place is material, and therefore part of the iſſue under the *modo et forma*. The counſel for the plaintiff admitted, that it was traverſable; but inſiſted that by not traverſing it particularly, the place was admitted, and could not be inſiſted on upon *non cepit*. But the Chief Juſtice held, that where the defendant avows at a different place, in order to have a return, he muſt traverſe the place in the count, becauſe his avowry is inconſiſtent with it; but where he does not inſiſt upon a return, he may plead *non cepit*, and prove the taking to be at another place, for it is material. Whereupon the plaintiff was nonſuit.

Manwaring *verſus* Harriſon. Ibid.

Within what time a goldſmith's note muſt be demanded.

UPON the 17th of *September* (being *Saturday*) about two o'clock in the afternoon, *Harriſon* gave to *Manwaring* in payment a note for 100*l.* by *Mitford* and *Mertins* goldſmiths, dated 5th of *September*, payable to *Harriſon* or order. The ſame afternoon *Manwaring* pays away the note to *J. S.* *Mitford* and *Mertins* paid all *Saturday* and *Monday*, and on *Tueſday* morning as ſoon as the ſhop was opened, and before any money paid, *J. S.* came and demanded the money, but *Mitford* and *Mertins* ſtopt payment: *Manwaring* paid back the money to *J. S.* and demanded it again of *Harriſon*; who refuſing to pay it, an action was brought. And on *non aſſumpſit* the Chief Juſtice told the jury, that giving the note is not immediately payment, unleſs the receiver does ſomething to make it ſo by neglecting to receive it in a reaſonable time, by which he gives credit to the maker of the note. He left it to them whether there had been any neglect, and obſerved that the note was payable to *Harriſon* who had kept it eleven days, and probably would not have demanded it ſooner than *Manwaring* did, it appearing the goldſmiths were in full credit all the while. The jury deſired they might find it ſpecially, and leave it to the court whether there was a reaſonable time; but the Chief Juſtice told them they were judges of that: whereupon they found *pro def.* and declared it as their opinion, that a perſon who did not demand a goldſmith's note in two days, took the credit on himſelf.

Philips

Philips *versus* Biron et al'.

Paſ. 7 Geo. rot. 249.

TRESPASS and falſe impriſonment againſt two, who both plead jointly, that there was a judgment againſt the plaintiff at the ſuit of *Biron*, which was afterwards ſet aſide by the court, but that before it was ſet aſide a *capias ad ſatisfaciendum* was proſecuted by the then plaintiff, under which he and the other defendant, who was the officer, juſtify the impriſonment. And on demurrer *Wearg* objected, that though an erroneous judgment is a juſtification, yet an irregular one is not, for that is a matter in the privity of the plaintiff or his attorney. *Raym.* 73. The officer indeed, if he had juſtified ſeparately, might have made a better caſe than the plaintiff; but having joined with him he muſt take the ſame fate.

Where a judgment is vacated for irregularity, the plaintiff is not juſtified, as he is where it is reverſed for error.

2 Sid. 125.

Et per curiam, It is a reaſonable difference in the firſt point, and like the caſe of avoiding acts done by an adminiſtrator, where the adminiſtration is revoked, and not reverſed; in the caſe of error it is no fault of the party, but of the court, and therefore binds till reverſed. But as to the other point *Eyre* J. differed, for he thought the court might upon theſe pleadings ſeparate the officer, ſince it appears he is juſtified in what he has done.

Caeteri contra, That he had waived the benefit by joining with the other; and now the only queſtion before the court is, whether the whole plea taking it altogether, be good or not. The treſpaſs is laid as joint, and the defendants juſtify it in the ſame manner; how then can the court ſever it and ſay that one is guilty and the other is not, when both put themſelves upon the ſame terms?

Adjournatur; and this term, it coming into the paper again, the court were of opinion, (*Eyre* J. *haeſitante*) that the officer had forfeited his defence, by joining in the ſame plea with the defendant, who was plaintiff in the firſt cauſe, and cited 1 *Saund.* 28. 2 *Cro.* 27. and gave judgment *pro quer'*.

Where the officer joins in defence with one for whom the warrant is no juſtification, he forfeits the benefit of it.

Hammond

Hammond *versus* Stewart.

Attachment granted against a witness for not attending on a *subpoena*.

THE defendant summoned one *Turner* a witness to attend the trial of the cause, who on service of the *subpoena* said, he would not attend, but run the hazard of forfeiting the 100*l.* penalty: and on affidavit of this *Ketelbey* moved for an attachment, that they might not be put to bring their action upon the statute, saying they do it every day in Chancery, even for not attending a master upon his warrant. And in the principal case the court made a rule to shew cause.

What notice a witness ought to have of a trial to which he is subpoena'd.

And this term the rule for an attachment *nisi* against the witness was discharged, it appearing that the *subpoena* was not served till two in the afternoon in the city, to attend the sittings that day in *Middlesex*, which the court said was too short notice, and that witnesses ought to have a reasonable time to put their own affairs in such order that their attendance upon the court may be as little prejudice to themselves as possible.

Eaſter Term.

8 Georgii Regis. In B. R.

'ir John Pratt, *Knt. Lord Chief Juſtice.*
'ir Littleton Powys, *Knt.*
'ir Robert Eyre, *Knt.*
'ir John Forteſcue Aland, *Knt.* } *Juſtices.*
'ir Robert Raymond, *Knt. Attorney General.*
'ir Philip Yorke, *Knt. Solicitor General.*

Glyn *verſus* Yates.

HE plaintiff recovered judgment againſt the defendant, and took out a *capias ad ſatisfaciendum*, and had a *non eſt inventus* returned and filed: then he took out *ſcire* s againſt the bail, and before the return of the ſecond *ſcire* s the principal died, upon which the queſtion aroſe, whe- the bail ſhould be relieved in this caſe, within the reaſon hat practice which indulges them to ſurrender the principal time before the return of the ſecond *ſcire facias.*

If the principal dies between the return of the *ca. ſa.* and the ſecond *ſci. fa.* the bail are liable. 2 Lord Raym. 1452. 8 Mod. 31.

.nd after argument and ſearch of precedents it was ruled, the bail ſhould not be relieved, they having taken the time r ſuing out the *capias ad ſatisfaciendum* at their own peril, and r that they could not diſcharge themſelves but by an actual ender.

Atkinſon

Atkinson *versus* Coatsworth.

Indentura facta inter A. et B. imports a sealing by both.
3 Danv. Abr. 266.
8 Mod. 33.

UPON error out of the county palatine of *Durham* in an action of covenant brought by the executor of the lessee against his assignee, wherein the breach was assigned in non-payment of rent to the original lessor; *Bootle* objected, that it did not appear, the first lessee ever sealed the lease; and if he did not, then there was no obligation upon him to pay the rent, and consequently no action could be maintained upon this covenant, which is only to pay the same rent to the first lessor, as was payable by the first lessee before the assignment. To which it was answered and resolved by the court, that the first deed being set out as *indentura facta inter* the lessor and lessee, by which the lessee *convenit et agreavit* to pay the rent, that was an implicit averment of a sealing by him within the reason of the case of *Taylor* v. *Dobbins*, *Mich.* 7 *Geo.* where *fecit notam suam* was held to import a signing. *L. Raymond* 1377.

2. That if this was not so, yet the defendant, by covenanting to pay the rent reserved by the first indenture, was estopped to say there was no such deed as could raise the rent. And therefore the judgment given below for the plaintiff was affirmed.

Dominus Rex *versus* Inhabitantes de Rufford.

Mandamus to appoint overseers in an extraparochial place.
8 Mod. 39.
Fortesc. Rep. 321.
Foley. 108. cited in 2 Salk. 486. marg.

MANDAMUS directed to the justices of the peace of the county of *Nottingham*, reciting, that within the *ville* of *Rufford* there are divers substantial freeholders able to contribute to the maintenance of the poor, and that there are no church-wardens or overseers to make a rate, and that there are poor unprovided for, *ideo* it commands them to appoint overseers.

They return, that the *ville* of *Rufford* is part of no parish, but time out of mind has been extraparochial without church, chapel or parochial rights, and that there never have been any overseers of the poor, *et ea de causa* they cannot appoint.

And there having been only an * *obiter* opinion of the court in the case of *Dolting* v. *Brewcomblodge*, *Hil.* 11 *Ann.* *B. R.* that overseers of the poor might be appointed in an extraparochial place; the court directed an argument, that the point might be solemnly determined.

* It was a SOLEMN opinion of the whole court, delivered by Lord *Parker*.

And

And after argument and confideration of all the ftatutes relating to the poor, the court were of opinion, that the powers given by the 43 *Eliz.* to be executed in parifhes, were by the 13 & 14 *Car.* 2. *c.* 12. extended to all townfhips and villages, whether parochial or extraparochial, and confequently overfeers might be appointed in this cafe, for which purpofe a peremptory *mandamus* was awarded.

Mayo *verfus* Archer.

IN trover for goods, on Not guilty pleaded a trial was had at *Nifi prius* in *London*, where the jury found this fpecial verdict: Qu. Whether a farmer who buys and fells potatoes can be a bankrupt.

That one *Richard Baxter* for divers years before any commiffion of bankruptcy taken out againft him occupied a farm of 300*l.* *per annum*, and during fuch occupation annually planted divers acres of the farm with potatoes, which he fold for gain: that he likewife bought of other perfons feveral great quantities of potatoes, with intention to fell them for gain, which he publickly did in feveral markets, and that he hired warehoufes to put them in, till he could conveniently fell them. That if this makes him a trader, he committed an act of bankruptcy within the intention of the ftatutes, and a commiffion iffued, and the plaintiff was made affignee. That after the act of bankruptcy, and before any commiffion iffued, the defendant recovered judgment againft the faid *Baxter* for 600*l.* debts befides cofts of fuit, and took a *fieri facias*, by virtue whereof the fheriff feized the goods mentioned in the declaration, which they find were before the bankruptcy the goods of *Baxter*. And whether *Baxter* was a trader or not within the intention of the feveral ftatutes againft bankrupts, is the doubt of the jury, whereon they pray the advice of the court: *et fi pro quer'*, they affefs damages, and if not a trader, they find *pro defendente*. 8 Mod. 46.

Chefhyre Serjeant *pro quer.* The 13 *Eliz. c.* 7. (which the fubfequent ftatute *Jac.* 1. appoints to be largely expounded) defcribes a bankrupt to be one buying and felling for gain. I admit a farmer or an inn-holder are not within the ftatutes, and were conftrued to be exempt before 5 *Annae* had made them fo. *Cro. Car.* 549.

His being a farmer will not fcreen him, if he deals as a trader likewife, and therefore I fhould think fome farmers might be made bankrupts under the notion of cheefemongers. I remember a motion to fuperfede a commiffion, where it was

 held

held that a gentleman of the bar who had a colliery, and deal in coals at *Durham*, was such a trader as might be a bankrupt. He need not get his whole living by buying and selling, for the word is *seeking* not *getting*, and therefore if he seeks his living this way, his seeking it another way will not alter the case. A dealing of this sort gains him that credit, which traders give one another, and that is the best rule to go by. 1 *Vent.* 166, 266, 29. 1 *Sid.* 411. 1 *Lev.* 17.

Artificers differ from those that buy and sell, and yet they may be bankrupts. Such are shoemakers, and many others.

There can be no doubt but such a dealing as this would have made him a trader, if the farming had not been found; now if that be taken to have altered the case, every man may take a farm, in order to avoid the statutes.

Branthwayte Serjeant *contra*. He might buy these potatoes in the ground, as many gentlemen do a crop of turnips, of which they sell the overplus, and yet were never reckoned to be traders. The case in 1 *Roll.* 520. says, that the buying and selling in order to promote a business which does not make a trader, will not cause a man to be a bankrupt. 2 *Jones* 156.

Chief Justice. I think the question will turn on the manner of finding, for there can be no doubt but on one hand a farmer cannot be a bankrupt, and on the other, that a dealer in potatoes may, if such a dealing be found as will shew it to be the man's trade: it is indeed said only, that he bought divers great quantities, which in an indictment would be ill; but I am inclined to think it will be well enough here, where it is only necessary to shew that he sought his living in that manner. I should think, if a *Herefordshire* man bought apples to mix with his own, and then sold the cyder, he would be a trader. As far as circumstances can conclude, it appears this man was a trader, for he bought the goods, and kept markets and warehouses. *Powys* Justice *accord.* If a farmer should deal in wool or hops, he will be a trader, and so will an inn-keeper who sells corn in quantities, which are not consumed in his house.

Eyre Justice. The verdict must set out the quantities, that we may judge what share of his living was sought thus.

Fortescue Justice said the quantity must be mentioned, That it might appear whether this or farming was his chief business.

Adjournatur. And afterwards the plaintiff moved, on an affidavit that the quantities were proved at the trial, that a *venire*

facias

facias de novo might be awarded. *Sed per curiam:* let the special verdict be amended in that respect: and so it was, and stood over upon an *ulterius*. And *Mich.* 9 *Geo.* without much argument judgment was given for the plaintiff.

Land *versus* Harris.

THE defendant gave bond to pay a sum of money by instalments at 5 *l. per annum*, and having failed at one of the days, the plaintiff brought his action for the penalty. And now *Wearg* moved upon the act for amendment of the law, that upon paying the 5 *l.* and costs, proceedings might be stayed. *Sed per curiam:* We cannot do it, for it never was the intent of the obligee that he would be put to so many several actions as one a-year.

4 Ann. c. 16. The act for amendment of the law relieves only on payment of the whole principal. 2 Stra. 814. *contra*. See 3 Bur. Rep. 1370.

Windham *versus* Wither.

Idem *versus* Trull.

THE plaintiff brought two actions upon a promissory note, one against the drawer, and another against the indorsor, and recovered in both. And now *Wearg* moved, that they having tendered the principal in one, and the costs in both, no execution might be taken out; which the court ordered accordingly, and said they would have laid the plaintiff by the heels, if he had taken out execution upon both.

Practice.

Hall *versus* Stone.

UPON executing the inquiry, the plaintiff was surprized with a defence, and not prepared to prove his whole demand; and the court set it aside on payment of costs, the damages being too small.

Writ of inquiry set aside where damages too small by neglect of plaintiff.

Lawrence *versus* Jacob.

IN an action by the second indorsee of a bill of exchange against the first indorsor, it was held sufficient to say the drawer had not paid it, without shewing a demand.

In an action against indorsor, need not shew demand on drawer. 8 Mod. 43. post, 649. 2 Stra. 1087. *contr.*

Jordan *versus* Harper.

In ejectment the plaintiff has his election to pay costs to which defendant he pleases.

SIR *Sebastian Smith* brought an ejectment against several persons who lived in cottages upon the waste as *paupers*, to try whether the cottages belonged to him as lord of the manor. The parish made defence, and the plaintiff was nonsuit, and paid the costs to one of the defendants who was in his interest; and upon motion the court said, they could not relieve the parish or the other defendants.

Connor *versus* Martin. In C. B.

Feme covert cannot indorse a bill of exchange.

THE plaintiff declared upon a promissory note made to a *feme covert*, and indorsed by her to him, and on argument judgment was given for the defendant, the right being in point of law vested in the husband, and the wife having no power to dispose of it.

Dominus Rex *versus* Archiep' *Armagh*.

What acts of Parliament bind the crown, tho' not named. Fortesc. Rep. 213. Fitzgib. 20. Bernard. K. B. 34. S. M. 3. 5. 2 Str. 1?3?.

ERROR of a judgment *in B. R. in Hibernia* in a *quare impedit* brought by the crown for the presentation to the church of *Louth*, being an advowson in gross. The attorney general counts that King *Charles* the Second was seised of this advowson in right of his crown, and presented one *John Hudson*, and so alleges several presentations by the crown, and brings down the title to his present Majesty, and shews a vacancy by the death of *Thomas Cox*. *unde* it belongs to the King to present; but the bishop and *Peter Jackson cum injuste impediunt*.

The bishop pleads, that long before 10 *Car*. 1. and ever since, there were within the parish of *Louth* both a rectory and vicarage endowed, and that King *William* and Queen *Mary* being seised of the advowson of the rectory presented the said *Thomas Cox*, who was admitted, instituted and inducted; and *Narcissus* archbishop of *Armagh*, being seised of the advowson of the vicarage, in the year 1712 presented the said *Peter Jackson*; and *Cox* died and *Jackson* survived, and before any presentation by the crown, the archbishop, by virtue of an act of Parliament 10 *Car*. 1. by writing under his archiepiscopal seal, united and consolidated the rectory and vicarage, *prout ei bene licuit*: and so concludes that he claims nothing but as ordinary, with the proper averments to bring the rectory and vicarage within the description of the act of Parliament.

2

The

The incumbent pleads the consolidation in the same manner, and the attorney general demurs to both pleas, and judgment is given below for the King, and on error in this court the general errors are assigned.

Fazakerley pro queren. in errore. The only question below, and which I shall speak to is, whether the crown shall be bound by this act of Parliament though not specially named: and to prove that the King is bound, I need only instance in some of the exceptions out of the general rule laid down in the books, and shew that this case falls within them. Acts for the advancement of religion, learning, providing for the poor, are mentioned as cases where the crown is bound. 11 *Co.* 70, 72, 73. 2 *Inst.* 359, 681. *Plow.* 248. 5 *Co.* 14. 1 *Roll. Rep.* 151.

This provision is for the advancement of learning by making it worth the acceptance of a man able to instruct the people: it encourages learning, when ministers have a prospect of being rewarded for their pains; and the poor will be the better for it, because the parson will be more able to relieve them.

Reeve contra. At the time of the union there was a right in the crown to present on the vacancy, and the intention of the statute was, that the union should be made when both the rectory and vicarage were full, that so both patrons might have an equal chance; for after the clause which enables the archbishop to consolidate, the act provides, that during the lives of the two incumbents they shall enjoy the rectory and vicarage distinctly, and upon the death of either, then the two rights shall survive to the other, and the patron of him that died first shall have the first presentation: no direction is given for settling the right, where the union is made during the vacancy of one; which shews that the intention of the Parliament was, to have the union made when both the incumbents were living: but now by this contrivance the archbishop is sure in all events of having the first presentation of the united benefices.

C. J. At common law two churches could not be united without consent of both the patrons, but now this act of Parliament giving the archbishop a right to controul the title of the patrons, we must construe it strictly, that so the act may do as little wrong as possible: and therefore if upon considering every part of the act it appears to be the intention of the Parliament that the union should be made when both the rectory and vicarage were full; as this construction works the least injustice, we shall certainly follow it if possible.

The clause runs thus: "And whereas in divers places of "this kingdom of *Ireland* there are within one parish both a "parson and vicar endowed, and in some parishes more: be "it enacted, that in every such case it shall and may be lawful to and for the bishop of that diocese and metropolitan of "that province within which the said parishes are situate, by "their writing under their archiepiscopal and episcopal seals, at "any time or times hereafter, to unite and consolidate all "and every the said parsonages and vicarages so being within "one parish, into one intire parsonage or rectory or benefice, "*yet nevertheless so*, that if such parsonages and vicarages, "or any of them, be at that time full of incumbents, that "every of the said incumbents may hold and retain to their "own use his and their respective parsonages and vicarages, "and all the profits thereof, for so long time as they shall "live, and continue lawful incumbents thereof; *and if one* or "more of such incumbents do die, or otherwise cease, resign, "be deposed, or deprived, that then the said parsonage, vicarage or benefice, so or by any other means growing void, "shall survive, remain, and accrue, to the survivors of the "said incumbents; and after such survivors accruing or "coming into one hand, shall thenceforth for ever be and "continue one whole and intire rectory and parsonage or benefice, according to the union and consolidation aforesaid to "such surviving parson and his successors for ever." And then it goes on to direct the method of presentation; and as to this case the direction is, that after the death of the survivor the patron of him that died first shall present, and then to take it by turns.

Now taking all this together, I think the only view of the Parliament was, to have the union made when both churches were full, and therefore they provide, that though the union be made when both are full, yet it shall not take effect till the death of one of the incumbents. As to that which was the main point below, I think they were mistaken, for I take it the King will be bound in this case: but we will consider of it.

Powys J. It is far from being clear to me, that the King shall not be bound by this act of Parliament. As to the construction of it, I think the only reasonable one is, that the union should be made in the life of both incumbents.

Eyre J. I think this statute will extend to the crown, because it does not deprive the crown of any prior right, but only new models it, and therefore differs from Dr. *Birch*'s case, where the ancient prerogative of the crown was to be destroyed. As to the construction of this statute, I am of opinion, that the

archbishop

archbishop may unite during the vacancy, for the power is given him to do it *at any time or times*, and then when the subsequent clause provides only for some particular cases, I can only take it to be a direction as to those particular cases, and not intended to abridge or controul the former power; and as to all other cases not expresly provided for, they must receive such a determination as is agreeable to law: this is what sticks with me, and is the only difficulty in the case, whether the latter part of the clause be a restraint of the general power, which it must be admitted would (if it stood singly upon that) include the case now before us.

Fortescue J. I make no doubt but the crown is bound by this statute; but then as it works a wrong to the crown, whichever way we take it, I think we are to afford it no latitude in construction. The case at bar I take to be neither within the words nor meaning of the statute, *yet nevertheless so that, &c.* is a part of the same clause, and in my apprehension is the same as if the statute had run, *yet in these cases only, &c.* for as they are introductive of a new law, they infer a negative; and therefore if this case does not fall within the subsequent provisions, it is not a case within the act of Parliament. Can any man think the Parliament would do so absurd a thing, as to give an alternative, and not say who shall present first? And yet that will be the case of all consolidations, that do not fall within the direction of the subsequent words: but then it is said this case must be left to the decision of the law; for my part I know of no law that will determine who shall present first; so that by this method of consolidating during the vacancy, the archbishop is to unite the King's rectory to his vicarage, and so to get the first turn; whereas take it the other way there will be no difficulty; it is expresly determined who shall present first, and the act does as little wrong as possible, by giving an equal chance to both: for these reasons I think the court below have done right in giving judgment for the King.

Adjournatur; and this term it was argued by Serjeant *Reynolds pro queren. in errore.* It being given up at the bar, that the crown was bound by the statute, he proceeded to maintain the consolidation, though made during a vacancy of the rectory. At common law all unions were derived from the authority of the ordinary with the licence of the crown and the consent of the patrons. 2 *Corp. jur. civ.* 256. *Cro. El.* 500. 2 *Roll. Abr.* 778. And *Dy.* 259. says, the proper time for an union was in a vacancy. If the statute has not adjusted the manner of presenting in this particular case, it must be done according to the rules of the common law.

Wearg contra. The common law has laid down no rules; for as these things were done by consent, the parties settled that matter amongst themselves. This act, according to *Hatton of statutes*, must be construed to work as little wrong as possible; the law regards our advowson as a thing of value, it is what we have a property in, there is a recovery in value for it, and it may be sold. The 31 *H.* 8. had no saving of the rights of strangers; and yet, *Jones* Sir *William* 71. it was held to be implied in order to prevent a wrong.

It may be a question whether by this union the patron of the vacant rectory has not intirely lost this right, it being difficult to determine how the ancient right can subsist in the new created church, since he can never say that church has been full of *his* incumbent, as the archbishop may.

C. J. Though the words of the act are general enough to take in this particular case; yet if it appears not to be within the intent and reason of the statute, we must construe it to be excluded. The plain intent was, that the union should be upon the most equal terms, and the least prejudicial to either party in favour of the other. At the time of the union the crown had a right to present, and this is to be taken away without any equivalent, by a construction that is to let in *iniquum*, and by a contrivance that ought not to be favoured. Besides the apparent injury of depriving the crown of the present turn; it is considerable, that the act not having settled the terms of presenting for the future, but only where both are full at the time of the union, it must necessarily create great difficulties in adjusting the right upon an union made whilst one church is vacant. I think this is a case that deserves no farther consideration, and the judgment must be affirmed. To which *Powys* J. agreed. *Et per Eyre* J. It is plain the prerogative right is invaded by the archbishop, who makes himself judge in his own case. *Fortescue* J. *accord'*. And the judgment was affirmed.

Curwen *versus* Fletcher.

Matters of record pleaded by way of dilatory if of another court must be *sub pede sigilli.* 8 Mod. 43, 44.

DEBT upon a bond: the defendant pleads in abatement, that the oaths were tendered to the plaintiff by virtue of the statute 1 *Geo. st.* 2. *c.* 13. *s.* 23. as a suspected person, and upon his refusal to take them, the same was certified to the quarter-sessions and there recorded, *prout*, &c. and afterwards the same was certified into *B. R.* by the clerk of the peace, as the

ie statute directs, whereby the plaintiff became a papist recusant onvict; *unde* the defendant prays *quod loquela remaneat sine die, &c.* And the plaintiff demurs.

Wearg pro quer'. This being a dilatory, the record of sessions ought to have been pleaded *sub pede sigilli.* 1 *Inst.* 128. *b.* *utw.* 17, 1100. 3 *Lev.* 334. *Mich.* 5 *Geo. in C. B. Cotesworth* and *More*, this exception was taken and allowed; for if *ul tiel record* were replied, there must be no day given. *Bro. Record* 36. And though the clerk of the peace has certified it ither, yet that is not conclusive, but traversable. 41 *E.* 3. 6. *Bro. Traverse of Office* 2. For he does not do it as a Judge, ut as a ministerial officer. Com. Rep. 307.

2. The statute 1 *Geo.* which creates this disability, has a proiso to exempt persons who before such tender have taken the aths, and therefore it ought to have been averred that he had ot taken them. On the statute 5 *Eliz. c.* 4. it was always sual to aver, the party did not exercise the trade at the time of naking the statute. 1 *Ven.* 148. 1 *Sid.* 303. Now indeed hat is discontinued, by reason of a moral impossibility, of which there is none in our case. It will be said, that this coming in by way of proviso, ought to be shewn on the other ide; but that rule does not hold place, where the matter is he very *git* of the whole. 1 *Leon.* 18.

3. There is another proviso, to restore the party on conormity; so that the disability being only temporary, the deendant ought not to pray that the *loquela* may be put without lay. 1 *Inst.* 128. *b.* 5 *Co. Trollop's* case. *Lutw.* 17, 18. And it has been held, that an ill prayer of judgment vitiates he whole plea. 5 *Mod.* 145. *Salk.* 297.

Bootle contra. The record of sessions alone does not create the lisability, but only that of this court, which is the sum of all: nd records of the same court need not be pleaded *sub pede igilli. Lutw.* 40. 2. This coming in by proviso ought to be hewn by them in their discharge 1 *Ven.* 134. 1 *Lev.* 26. 3. The *&c.* at the end implies every thing proper to make it right prayer of judgment. At least this should have been hewn for cause of demurrer. 3 *Lev.* 66. *Lev. Ent.* 11. *Thomf.* 191. *Brownl. Red.* 461, 466. 2 *Mod. Ent.* 6. 1 *Inst.* 362. *Litt.* § 691. 2 *Lev.* 19. 34 *H.* 6. 1, 2, 24.

Wearg. It still continues a record of sessions, and the clerk of the peace only transmits an account, that there is such a record.

Et

Et per curiam, The disability being only temporary, this plea is in the nature of a dilatory, and therefore should be pleaded *sub pede sigilli*. And it is considerable, whether this certificate be any record of this court, This does not seem to be within the general rule of proviso's, because the enforcing people to take the oaths being the aim and design of the statute, it is much stronger than the common case of a proviso.

Where matter of record must be pleaded *sub pede sigilli*.

Adjournatur; and this term it was argued by *Fazakerly pro querente*. This plea of a disability cannot be pleaded after a general imparlance. 1 *Mod.* 14. *Yel.* 112. 1 *Ven.* 76, 135. Neither can privilege. 3 *Lev.* 343. *Trin.* 9 *Ann. in C. B. Kelsey* v. *Sedgewicke*. Nor to the jurisdiction. 1 *Lev.* 89. 1 *Inst.* 128.

2. It should be with a *profert in curia sub pede sigilli*, whereas it is only with a *prout patet per recordum remanens* in this court. *Bro. Record* 36. *Co. Litt.* 128. *Lutw.* 17, 18. 3 *Lev.* 334. *Lutw.* 1100. *Lit.* § 201. *Mich.* 5 *Geo. in C. B. Moor* v. *Coatsworth*, this exception was taken and allowed on demurrer. The matter of the conviction is traversable, and should therefore be alleged, otherwise you give the clerk of the peace a very great power to bind persons by his certificate. 1 *Leon.* 205. *Mo.* 541. *pl.* 714.

He mentioned the two other exceptions, for want of a *quousq.* and that of the proviso, and cited the same cases.

Reeve contra. The rule laid down as to imparlances is generally right, but the reason of it does not extend to this case; for where you are to give the plaintiff a better writ, you must do it in the first instance, that he may receive as little delay as possible; but here we say the plaintiff is intitled to no writ at all.

2. The conviction is a record of this court, and so need not be pleaded *sub pede sigilli*; and this differs from the case of an outlawry, where the record is that which creates the disability, whereas here the record is only the evidence of it. It is a matter of fact, whether he neglected to take the oaths, and as such it might have deen traversed; and it is like the plea of *auter action pendent* in another court, which is never pleaded *sub pede sigilli*, because it involves a matter of fact, whether both are for the same cause of action.

3. It will be very well without a *quousque*, and there are many precedents so in the case of an excommunication pleaded. 1 *Inst.*

1 *Inst.* 127, 128. *Rast.* 320, 333, 334. *Lev. Ent.* 11. *Tho.* 191. It would be well enough, if it was only *petit judicium*, because the court will give the proper one. 2 *Lev.* 19. 1 *Lev.* 222. *Hil.* 2 *Ann. B. R. Wilson* v. *Cross*, *Error e C. B.* in replevin, the defendant pleaded *prisel en auter lieu*, to which there was a demurrer concluding in bar; and the court rejected all that came under the *petit judicium*, saying, as that was sufficient, the other should not vitiate it.

He said the proviso extended only to such as were to take the oaths upon account of qualifications, but upon looking into the act of Parliament, it appears to be general.

Curia advisare vult. And *Trin.* 11 *Geo. respondes ouster agard*, without further argument or debate, they saying it could never be supported after an imparlance.

Trinity

Trinity Term,

8 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Justice.*

Sir Littleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Justices.*
Sir John Fortescue Aland, *Knt.*

Sir Robert Raymond, *Knt. Attorney General.*

Sir Philip Yorke, *Knt. Solicitor General.*

Dominus Rex *versus* Inhabitantes Sancti Petri in Civit' Oxon'.

If the master carries his servant on a visit and stays forty days, the servant gains a settlement. Foley 272. Cas. of Set. and Rem. 105. pl. 139. 8 Mod. 49. See Bur. Rep. 311.

MARY Norris having intruded herself into the parish of *St. Peter*, was by an order of two justices removed to *Fawley-Court*, as the place of her last legal settlement. Upon appeal to the sessions they state the fact specially, that she was hired for a year into *Christ-Church* College in *Oxon*, being an extraparochial place, where she served part of the time; that during the year her mistress went upon a visit to *Fawley-Court*, where she staid three months, and took her servant with her. and afterwards they returned to *Christ-Church*: and upon the whole, the sessions discharged the order for sending her to *Fawley-Court*.

And now upon debate it was adjudged a settlement in *Fawley-Court*, and consequently the last order was quashed, and the order of two justices set up again.

It

It was not disputed since the case of *Rufford*, but that the ring into an extraparochial place would give a settlement. The ly doubt was, whether the settlement gained at *Christ-Church* as not superseded by a subsequent settlement at *Fawley Court*: d they were all of opinion it was. As to the case of a master ho goes upon a visit, they strongly inclined it would be no ttlement; because it must have that consequence, that he may sent away. But as to the case of the servant, they all held it settlement; for he comes there in the capacity of a servant, and taken to be hired into any parish where he serves forty days; d it is not material to him, whether the master goes there der the capacity of gaining a settlement or not; like the case a school-boy, he gains no settlement, but the servant that aits upon him will. And the court said, they could not take e return to *Christ-church* to have given her a new settlement ere, it not being stated to have had a continuance of forty ys.

See 1 *Bur.* Rep. 308. where this report is stated as incorrect and erroneous; but it is substantially right.

Dominus Rex *versus* Inhabitantes de Lambeth.

THE parson lets his tithes to farm; and the farmer agrees with the tenant of the land, that in consideration of his ying so much, he shall retaid the tithe, and gather in the hole crop without dividing: and which of the two is charge-le to the poor's rate as occupier of the tithes was the question. nd the sessions discharge the lessee of the parson, and tax the nant of the land. *Et per cur'*: The order must be quashed. he farmer of the tithes is *prima facie* liable to the poor's rate, d therefore unless he can throw that charge over upon another, e tax must be made upon him. The tenant of the land in this se can never be said to be the occupier of the tithes; for he is ther a person who buys the tithes, or else he is to be taken as only cused from paying any; and no body can say but that though e parson thinks fit to excuse a parishioner, he will still remain point of law the occupier of the tithes. This agreement ing only by *parol*, cannot enure as an under-lease of a thing at lies only in grant. Suppose it was the case of underwoods, hich are sold standing, and the vendee grubbs them up; can be imagined, that makes him the occupier; or suppose the nant sells the whole crop standing, will that make him less e occupier of the land? If it should, it would be impossible r the officers of the parish to know whom to charge. We ust take this tenant of the land to be like any other buyer of the hes, since he has no more title to them than any stranger hatsoever; and when the parson or his farmer receives a sum money in lieu of tithe, that is in law a receipt of the tithe;

Where the parson agrees that the tenant shall retain the tithes, yet the tax for them must be upon the parson. 8 Mod. 61. *Fortesc.* Rep. 318. Cas. of Set. & Rem. 106. pl. 140. *Foley* 25.

with

with this only difference, that it is not tithe in kind. In the case of a compofition (as this is) or a *modus*, it was never thought but that the parfon was chargeable as occupier of the tithe: therefore there being no colour to charge the tenant of the land, the order of feffions muft be quafhed.

Between the Parifhes of Eaftland *and* Wefthorfley.

Turning the fervant out of doors before the end of the year doth not prevent the fettlement.

THE fact was ftated fpecially on an order of feffions, that a fervant was hired for a year, and the day before the year expired the mafter told him, that to prevent his gaining a fettlement in that parifh, he fhould go away immediately, which the fervant refufed to do, infifting to ferve out the year, whereupon the mafter turned him out of doors. And the court held this to be fuch a fraud in the mafter, as fhould not prevent the fettlement of the fervant.

Robinfon *verfus* Davis.

Practice.

UPON affidavit that the original award was loft by coming up in the *Briftol* mail, which was robbed; *Huffey* moved upon a copy of it, and had a rule for an attachment *nifi.*

Fifher *verfus* Emerton.

Practice.

THE plaintiff got judgment on the *fcire facias* againft bail, pending error by the principal, and took them in execution; and now they moved to be difcharged. *Sed per curiam:* Though you might have applied, and had the proceedings ftayed; yet we will not fet them afide. If an action of debt had been brought upon the judgment, we fhould have granted an imparlance, if it had been afked; but we never fet afide the judgment, when it is once figned; becaufe we take it, you by your not applying in time have fubmitted to meet the plaintiff. *Fieri non debet, factum valet.*

Noke *verfus* Caldecot.

Warrant of attorney of any term *pendente lite* is fufficient. Poft, 612. 2 Stra. 807. Fitzgib. 191. 8 Mod. 77. S. P.

UPON error *e C. B.* the court held, that if there be a warrant of attorney of any term *pendente lite*, it is enough to warrant the proceedings, and there is no neceffity it fhould be of the term in the *Placita*.

Colebrooke

Colebrooke *versus* Diggs.

THE plaintiff obtained judgment in *B. R.* of which error was brought in the Exchequer Chamber, and bail put in: affirmance there, error was brought returnable in Parliament; and upon consideration the court held that there must fresh bail. There must be new bail on a second writ of error. 8 Mod. 79.

Fry *versus* Carey.

AN action was brought in the sheriff of *London*'s court against two partners, one brings a *habeas corpus* and puts bail for himself only. And *Strange* moved for a *procedendo*, which was granted; for otherwise the plaintiff will be disabled to go on in either court. *Procedendo.*

Dominus Rex *versus* Green.

Moved to exhibit articles of the peace on behalf of *Elizabeth Collet* a quaker, but she refusing to swear, the court could do nothing. Quaker cannot exhibit articles of the peace without oath.

Between the Parishes of Hobey *and* Kingsbury.

TWO justices adjudging the settlement of the husband to be at *Kingsbury*, and that he is likely to become chargeable to *Hobey*, send him, his wife, and son of one year old to *Kingsbury*: and whether this was good as to the wife and child was the question; and held well enough, and the order confirmed. Adjudication of husband's settlement sufficient to send the wife with him.

Anonymous.

In Middlesex, coram Pratt, *Chief Justice*

THE Chief Justice allowed the wife's declaration, that she agreed to pay 4 *s. per* week for nursing a child, was good evidence to charge the husband; this being a matter usually transacted by the women. Declaration of wife, where evidence against her husband.

Michaelmas

Michaelmas Term

9 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Juſtice.*

Sir Littleton Powys, *Knt.* }
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir John Forteſcue Aland, *Knt.* }

Sir Robert Raymond, *Knt. Attorney General.*

Sir Philip Yorke, *Knt. Solicitor General.*

Inter paroch' Sancti Petri in Civit' Oxon' *and* Chipping Wicomb in Com' Bucks.

Hired ſervant is ſettled where ſervice is. Forteſc. Rep. 318. See 1 Bur. Rep. 308.

UPON a ſpecial order of ſeſſions it appeared, that the maſter of the *Oxon* ſtage coaches hired a ſervant for a year to ſtay in an inn in *Wicomb* where the coach baited, and to take care of the horſes: he lived there for the whole year. But, in as much as the maſter lived all the while in *Oxford*, the ſeſſions adjudge the ſettlement of the ſervant to be with him. *Et per curiam*: The order muſt be quaſhed, for the ſettlement is gained by the ſervice, which was in *Wicomb*; and it would be hard to make it a ſettlement in *Oxon*, when the officers there had no power to remove him. The officers of *Wicomb* might have removed him, if they had pleaſed: they did not do it; and therefore they muſt provide for him.

Between

tween the Parishes of St. John's in the Town, *and* Amwell in the county, of Hertford.

BY the statute 9 & 10 *W.* 3. *c.* 11. it is provided, that no certificate-man shall gain a settlement in the parish to which he comes with such certificate, unless he takes a lease 10*l. per annum*, or shall execute some annual office *in such parish.* In this case the certificate-man took a farm of 10*l.* *per annum*, part of which was in *St. John's*, and part in *Amwell*, t the greatest part, together with the house, being stated to in the parish that received his certificate, the court held it settlement there.

9 & 10 W. 3. c. 11. An entire tenement of 10*l.* *per ann.* tho' it lies in two parishes, gives a settlement in that where the party lives.

Sir George Ludlam, Chamberlain of London, *versus* Lopez.

BY the statute 6 *Ann c.* 16. intitled "An act for repealing "an act for the well garbling of spices, and for granting an equivalent to the city of *London* by admitting brokers," is taken notice, that the office of garbler of the spices is an inheritance of the city of *London*, and by them leased out for 0*l. per annum*, which office and duty it was convenient to abolish, by which the revenues of the city would be diminished; was therefore enacted that every broker should on his admission pay 40*s.* to the chamberlain, and a yearly sum of 40*s.* the use of the city, and that every person acting as a broker without such admittance should forfeit and pay to the use of the mayor, commonalty and citizens of the said city, for every offence the sum of 25*l.* to be recovered by action of debt in the name of the chamberlain.

7 G. c. 19. The act of grace doth not release a forfeiture to which an interest is vested in another. 8 Mod. 103.

The defendant acted as a broker without admittance; and in action for the penalty the question was, whether this forfeiture was pardoned by the last act of grace?

For the defendant it was insisted, that this is a statute offence a publick nature, and the action arises *ex maleficio*, like the case of exercising a trade contrary to 5 *Eliz.* which is always pardoned, unless it be excepted. *Cro. Eliz.* 632. In an appeal of murder the defendant was convicted of manslaughter; and though this was the suit of a private person, yet it was held that the King might pardon the burning in the hand. And s the penalty is but a consequence of the offence, if that be one away, the penalty must fall: and it makes no difference that the penalty is given to the chamberlain, and not a common informer. 5 *Co.* 49.

Sed per curiam: This is not to be compared to the case of a common informer, who has no interest vested in him till action brought, whereas here the city has an interest vested upon committing the offense, and they may release the penalty without bringing any action. They are purchasers of this revenue, and the laying a penalty does not make it a publick offense; it is only a security for the duty, that if brokers do not take licence, they shall pay so much; and if this penalty were not added, the revenue would be worth nothing. 3 *Inst.* 238. is express that the King cannot pardon, where the action is given to the party grieved; for that would be for him to discharge the interest of another. The offense against 5 *Eliz.* is of a publick nature, and indictable, but this is not. *Et per Eyre* Justice, I much question, whether that case of the appeal be law, for the burning the hand is part of the judgment.

This being upon a point saved at *nisi prius*, the plaintiff had judgment.

Dominus Rex *versus* Kelley.

Warrant for treason executed in court.

THE defendant having been formerly bound over, appeared the first day of the term upon his recognizance, and Mr. Attorney acquainted the court, that there was a new warrant against him for treasonable practices committed since the last term, which the officer had not been able to execute; and therefore desired leave that it might be executed in court, which was granted, and done accordingly.

Bland *versus* Pakenhan.

Practice.

THE court held, that the presence of an attorney of *C. B.* at the execution of a warrant to enter up judgment in *B. R.* was sufficient.

Dominus Rex *versus* Tod et al'.

Mandamus to proceed to judgment. Sel. Cas. 248.

BY the statute 6 *Geo. c.* 21. the justices of peace have a jurisdiction given them in some cases to receive an information, and make their determination, upon a seizure of brandy: upon information exhibited by the officer of the customs, the fact appeared not to warrant the seizure, but the justice in favour of the officer refused to dismiss the information, so as the owners

owners might have their brandy again; and now *Wearg* moved for a *mandamus*, to compel him to determine the matter, which was granted accordingly.

Green *verſus* Guantlett.

THE court on motion for a new trial held, that the giving notice of trial at the end of half a year after iſſue joined, would prevent the neceſſity of giving a term's notice, till a year after the laſt notice which was given and countermanded. *Pro def.* Practice.

Dominus Rex *verſus* Reader.

THE defendant was convicted for keeping an alehouſe without licence, and was thereupon committed for a month as the act directs. After he had lain a fortnight, he brought a *certiorari*, and upon the return of it he was admitted to bail; the court being of opinion, that if the conviction was confirmed, they could commit him in execution for the reſidue of the time. Practice, bail.

Hooper *verſus* Dale.

THERE being a vacant poſſeſſion, a leaſe was ſealed upon the premiſſes, and the defendant ejected the leſſee, and then gave a warrant of attorney to confeſs judgment: which was now moved to be ſet aſide, for that the caſual ejector can in no caſe confeſs judgment. I endeavoured to diſtinguiſh this from the common caſe, where the caſual ejector is only a nominal perſon; but the court ſaid it was a trick, and ſet it aſide. Caſual ejector cannot confeſs judgment.

Sheather *verſus* Holt.

STRANGE moved for an attachment for a reſcue of one taken on a *capias ad ſatisfaciendum*. And upon the rule to ſhew cauſe, the court ſaid, that in regard theſe motions grew upon them more than they at firſt intended, they would expect a return in all caſes for the future; and therefore diſcharged the rule. No attachment on affidavit of a reſcue without a return.

N. B. Afterwards upon conference with the Judges of *C. B.* who grant theſe attachments every day, the court thought fit to come into that practice again.

Hil. 9 *Geo. Grindney* v. *Touſter*, *Moore* v. *Gallard*, they reſumed the old rule, and required a return. *Young* v. *Paine*, *Trin.* 5 *Geo.* 2.

The gaoler of Shrewſbury's caſe.

No attachment for a voluntary eſcape.

MR. Attorney moved for an attachment againſt him for voluntary eſcape of one in execution for obſtructing an exciſe officer in the execution of his office; but the court refuſed to grant it, there being no precedent for that purpoſe; however they ordered him to ſhew cauſe, why there ſhould not be an information.

Fleming *verſus* Langton.

Where there are iſſues in fact and in law, the plaintiff may waive the iſſues in fact, and take out an inquiry upon the demurrer.

THERE were four counts in the declaration, *non aſſumpſit* pleaded to three, and a demurrer to the fourth. After judgment on the demurrer, the plaintiff takes out a writ of inquiry and executes it. This was moved to be ſet aſide, there being no *nolle proſequi* on the roll; and it was inſiſted, that the plaintiff ought to take out a *venire*, *tam* to try the iſſue, *quam* to inquire of the damages upon the demurrer. *Sed per curiam*, That is indeed the courſe where the iſſues are carried down to trial before the demurrer is determined, and in that caſe the jury give contingent damages; but here the demurrer being determined, and the plaintiff being able to recover all he goes for upon that count; there is no reaſon why we ſhould force him to carry down the cauſe to *niſi prius*: and as to the want of a *nolle proſequi* upon the roll, he may ſupply that when he comes to enter the final judgment; if not, you will have the advantage of it upon a writ of error. The judgment upon the inquiry muſt ſtand.

Barker *verſus* Forreſt.

Replication *non eſt attorn'*, muſt not conclude *al pais*.

IN *C. B.* the defendant after ſpecial imparlance pleaded his privilege of an attorney of *B. R.* The plaintiff replied him not an attorney, and concluded to the country. And on demurrer judgment in chief is entered for the plaintiff, but reverſed on error, becauſe being on demurrer, the moſt the plaintiff could have, was a *reſpondes ouſter*. *Et per curiam*, That there muſt be in this caſe, becauſe though the replication is ill in concluding to the country, yet the plea is ill too, as coming after an imparlance, though it be a ſpecial one.

Lock

Lock *versus* Major.

BY ſtatute 5 *Geo.* c. 24. § 30. it is provided, " That a " bankrupt's certificate ſhall be given in evidence, and be a full diſcharge of any action that ſhall be brought by any creditor of *ſuch bankrupt.*" A point was reſerved at *niſi prius* before Pratt C. J. whether it was not ſtill neceſſary to prove an act of bankruptcy. And upon debate in open court they were all of opinion it was, for the word *ſuch* was relative, and therefore he muſt be proved to be ſuch a perſon as is before deſcribed.

5 G. 1. c. 24. Bankrupt's certificate no evidence of the bankruptcy. *Altered by* 5 Geo. 2. c. 30. See Green.

Anonymous.

THE court granted a rule for the coroner of *Wenlock* in *com' Salop* to take up a body, in order for a new inquiſition, the former having been quaſhed.

Rule for coroner to take up the body.

Thornton *versus* Moulton.

At Guildhall, coram Pratt *C. J.*

AT the opening of the books the two brokers met, and the ſelling broker told the other, he was ready to transfer; the other alleged it was uſual to indulge the buyer for two or three days, and that he would find his principal in that time, which the other not diſagreeing to, nothing further was done. And for want of having the buyer called at the books the firſt day of the opening, the Chief Juſtice ruled it not a good tender, and the plaintiff was nonſuited.

What a tender of ſtock.

Hopſon *versus* Trevor. In Canc.

THE defendant being the ſon of the late Maſter of the Rolls, and under the diſpleaſure of his father, did upon the marriage of his daughter with the plaintiff enter into a bond of the penalty of 5000*l.* conditioned to ſettle one third of whatever eſtate in lands ſhould come to him on the death of his father. The maſter dying without a will, a very conſiderable eſtate deſcended to the defendant his eldeſt ſon, who neglecting to make any ſettlement within the time limited, the plaintiff brought his bill in this court for a ſpecific performance. The defendant by his anſwer inſiſts, that he ought to be left to

Specifick performance decreed where the party inſiſted to forfeit the penalty. 2 P Will. Rep. 191. 10 Mod. 507.

fue the penalty, having his remedy upon that at law: but Lord Chancellor decreed a fpecifick performance, faying it was unreafonable to give an election to the defendant, when the plaintiff could have none; for if the lands to be fettled were not of the value of 5000 *l.* he could never refort to the penalty; and on the other hand, if they exceeded that value, it was not juft he fhould be left to it; neither would it anfwer the intent of the parties, which was to fecure a provifion for the wife and children by the fettlement of the eftate; becaufe if the plaintiff was to have the penalty, it muft be as a debt due to himfelf, and this court would have no power to compel him to do any thing out of it for their benefit.

Peele *verfus* Capel. In Canc.

Bond of refignation where to be allowed.

CAPEL on prefenting *Peele* to a living, took a bond from him to refign when the patron's nephew came of age, for whom the living was defigned. When the nephew was of age, inftead of requiring a refignation, it was agreed between them all, that *Peele* fhould continue to hold the living, paying 30 *l. per ann.* to the nephew. *Peele* makes the payment for feven years, but refufing to pay any more, the patron puts the bond in fuit; and then *Peele* comes into this court for an injunction, and to have back his 30 *l. per ann.* On the hearing the Chancellor granted the injunction, not (as he faid) upon account of any defect in the bond itfelf, which he held good, but on account of the ill ufe that had been made of it: and as to the money, it being paid upon a fimoniacal contract, he left the plaintiff to go to law for it.

Keen *verfus* Whiftler. In C. B.

Where more cofts than damages. Gilb. Eq. Rep. 197. Bac. Abr. 513.

TRESPASS for chafing his cow, and his domeftick fowls, *viz.* hens, geefe, *&c.* with dogs, which dogs were ufed to bite tame fowl, by whofe biting they were killed. On Not guilty, verdict for the plaintiff; and he had his full cofts, becaufe this is not a trefpafs wherein the right of the freehold may come in queftion.

Blackwell

Blackwell *versus* Nash.

Intr. Mich. 8 Geo. rot. 212.

'N debt for a penalty, the plaintiff declares, that he covenanted to transfer to the defendant on or before the 21st of *September* so much stock, and that the defendant *in consideratione praemissorum* covenanted to accept and pay *for it*; and then avers that e was at the books the 21st of *September*, *et paratus fuit et obtulit d transferendum* to the ~~plaintiff,~~ defdt. who then and there refused to ccept, or pay.

A. is to transfer stock, and *B.* to pay *for it*, the transfer is not a condition precedent. 8 Mod. 105.

On demurrer it was objected by *Acherley*, that *for it* made it condition precedent. 14 *H.* 4. 19. 5 *Co.* 21. 15 *H.* 7. 18. *Dy.* 76. 2 *Saund.* 352. And therefore to intitle himself to this ction, the plaintiff should have shewn an actual transfer of the tock, and the rather here, because the covenant was not to pay he money till the day of transfer, which brings this case out of he distinction laid down in *Thorpe* v. *Thorpe*, *Salk.* 171.

Reeve contra. Here are mutual covenants, and therefore we eed not shew a performance of our part of the agreement; but we were obliged, a tender is sufficient, especially a personal ne, as this must be taken to be from the refusal which is alged; and it being a personal tender, that helps the want of ny averment of the usage of the company, and of staying till e books were shut, acording to the case of *Lancashire* v. *Kilngworth*, for this is like the tender of rent, where a refusal on ny part of the day excuses the party from any longer attendnce; besides, this declaration is according to the precedents. *Brownl. Ent.* 14. *Br. Red.* 109. *Lutw.* 226. *Lev. Ent.* ;0, 44.

2 Salk. 623. pl. 3. 12 Mod. 529. Lord *Raym.* 687. Com. Rep. 116. pl. 81. 3 Salk 342. pl. 5]

Et per curiam, *In consideratione praemissorum* is in consideration f the covenant to transfer, and not of an actual transferring, or which the defendant has his remedy; or if it were, a tender nd refusal would amount to a performance: in all these cases he great question is, who is to do the first act: but when the ransfer is to be *upon payment*, there is now colour to make the ransfer a condition precedent.

Judicium pro quer' nisi, but enlarged to next term on the importunity of the defendant's counsel, who alleged he had new oints. *Hil.* 9 *Geo.* the plaintiff had judgment without argument.

Trin. 10 *Geo.* the judgment was affirmed in the Exchequer Chamber.

Dominus Rex *versus* Decan' et Capitul' Dublin.

Q. Whether error will lie on the award of a peremptory *mandamus*. 8 Mod. 27.

ERROR *e B. R. in Hibernia* of the award of a peremptory *mandamus* to admit *Robert Dougate* to his ſtall in the choir and his voice in the chapter.

The firſt *mandamus* recites, that the ſaid *Robert* had been legally inſtituted and inducted to his ſtall and voice, which the dean and chapter had refuſed him; *ideo, &c.*

After an *alias* and *pluries* they return, that *Hen.* 8. by his letters patent under the great ſeal of *Ireland*, dated 10 *May*, *Anno Regni* 33. gave to the dean and chapter and their ſucceſſors a power to make ſtatutes and ordinances for the better government of the church, by virtue of which they ordained, that every perſon before he ſhould be admitted to his ſtall in the choir and his voice in the chapter, ſhould take his corporal oath before the dean and chapter for the time being, of canonical obedience to the dean, and to obſerve the ſtatutes and cuſtoms of the church, and to keep the ſecrets of the chapter. That they were ready to have admitted the ſaid *Dowgate* to his ſtall and voice, but that he refuſed to take the ſaid oath, though requeſted ſo to do, *et ea de cauſa* they cannot admit him. Then the entry goes on with a *quia videtur cur'*, that the return is ſufficient, *ideo concedatur, et per cur' hic ordinatum eſt, quod fiat breve de peremptorie mandamus.*

Upon error of this the general errors are aſſigned, that no ſuch writ ought to have been awarded, and that the return ſhould have been allowed. The Attorney General here pleads *in nullo eſt erratum.*

Fazakerley pro queren. in errore. That a writ of error will lie in this caſe, though that is a point never yet determined: it is the policy of the law, that no one court ſhould be intruſted with the ſole determination of any man's property; for which reaſon it furniſhes the party with writs of error, bills of exceptions, demurrers to evidence, &c. If the validity of this return had been determined in an action, nobody will ſay but a writ of error would lie; and is not the very ſame matter put in judgment, only in a more ſummary way? and is not property more and more every day the ſubject of *mandamus's*? 2 *Cro.* 6. ſays all proceedings of courts of juſtice ought to be examinable in another place; and in the caſe of *Aſhby* v. *White* it was held, that a writ of error would lie on the award to remand, where the court refuſed to bail.

Error lies on the award to remand, where the court refuſes to bail.

Taking

Taking it therefore for granted that a writ of error will lie, hall proceed to mention my exceptions to the *mandamus*.

1. Here is no title to the archdeaconry set out, only that he s collated, instituted and inducted: in a *quare impedit* they rays shew a vacancy.

2. The writ is *felo de se*, and shews it to be unnecessary, for ng inducted he has a right to all the incidents of his office. ppose an house was annexed to the archdeaconry, would this irt grant a *mandamus* for that? No surely, they would leave 1 to his ejectment: you will indeed help him into the office, hout which he could not maintain an ejectment. The case a parson is the same, for he is put to sue for his tithes, and inot have a *mandamus* to the parishioners to set them out. In case of corporation officers indeed you grant a *mandamus* to iver the *insignia* after the party is sworn in; but that is cause the office is annual, and it is necessary the mayor uld have them immediately, in order to command the more pect.

3. This is an ecclesiastical office, and therefore the right ly not be so properly determinable on a *mandamus*, as before : ordinary.

Reeve contra. A writ of error may by the same reason lie on award of the first writ of *mandamus*, as on the perempory :; and then it is easy to see, the delay would be infinite.

The property is not determined on this writ, for it gives the ty no right whatsoever; on the award of a *habeas corpus* error l not lie. 8 *Co.* 127. And in the case of the bishop of *David's* the entry was, that the party prayed a prohibition, 'i *non conceditur*, and yet no error was held to lie of it. And the case of *Strode* v. *Palmer*, *Trin.* 2 *Geo.* where this point s stirred but not determined; it was however resolved by all court, that it would be no *supersedeas* to the peremptory *mannus*; and therefore I cannot imagine what use it will be of, as the *mandamus* gives no right, he has nothing to make reution of upon the reversal.

Ld. Raym. 545. Error lies not on denial of a prohibition.

Lill. Ent. 248. ante, 105. post, 541.

But if error will lie, yet the return is insufficient, and there-e the peremptory *mandamus* was well awarded. 1. Because : by-law is void, in imposing an oath on a person not ob-ed to take one, and in giving themselves a power to adminter it. Besides, he is not a member till admitted, and there-e this is to bind one not a member. 2. They have not set out,

Where a corporation has a power to make statutes they cannot give themselves a power to administer an oath.

out, when the by-law was made, perhaps it was ſince our induction. 3. They ſay he was requeſted to take the oath, but not that it was tendred to him.

As to the exceptions to the *mandamus*, I ſhall content myſelf with this general anſwer, that the party here has no occaſion to ſhew his title; and it was never intended he ſhould be as exact, as if he was anſwering an information in nature of a *quo warranto*.

Fazakerley. The caſe of *Strode* v. *Palmer* is very different from this, for that was a caſe upon the *mandamus* act, and the judgment of the court was founded on the words of that ſtatute, which are, "That if the return be adjudged inſufficient, a "peremptory *mandamus* ſhall iſſue *without delay*."

Chief Juſtice. Here are three queſtions, 1. Whether the *mandamus* be good? 2. If the return be ſo? And, 3. If the writ of error will lie?

A *mandamus* is only to give a *legal*, not an *actual* poſſeſſion. See *Black.* Rep. 300.

As to the firſt, it is true we grant *mandamus's* where otherwiſe the party would be without remedy, as to be ſworn in; but if that be done, we go no further, but leave him to get an actual admiſſion how he can: we give him a legal poſſeſſion, and then leave him to his remedy. Indeed in the caſe of *mandamus's* to reſtore, we go further: but that is becauſe he had an actual poſſeſſion before: and the reaſon why in the other caſe we do not meddle with the actual poſſeſſion is, becauſe when we have given him a legal one, he is by law as much intitled to every right belonging to the office, as if he had the actual poſſeſſion, and may maintain that right without our aſſiſtance, even againſt another who is in poſſeſſion of the office. Conſider what would be the conſequences if we ſhould interpoſe: here are two perſons who both claim a title to the ſame office, and each of theſe have an equal right to our aſſiſtance; we grant each of them a *mandamus* to be admitted, which writs are executed on behalf of both; what then are they to do when they come together? neither will ſubmit to the other, and ſo there is no remedy but to fight it out, by which means we are the inſtruments of breaking the peace. He that has the legal poſſeſſion, may maintain his right againſt any diſturbances, we only put him in the way to purſue his proper remedy. Here has been an induction, and that is ſufficient; and therefore I think the *mandamus* deſtroys itſelf. As to the caſe of the *inſignia*, that depends upon the particular reaſon that has been mentioned.

2. But if the writ were proper, then the return is ill: can they force an oath upon a man not to reveal ſecrets? I am ſure it is a very dangerous one: and as to the canonical obedience, they

they may enforce that by ecclesiastical censures without an oath. Dr. *Sherlock*'s case was founded on an act of Parliament, which said he should have a stall and voice; and till that was assigned, he was not in legal possession of the prebend. *Ante*, 159.

3. As to the third point, I am doubtful whether the writ of error will lie; if the return had been allowed, I should think it hard to re-examine it.

Powys Justice. I think the *mandamus* is not proper, and that the case of the *insignia* stands single on that particular reason, that without them nobody will give the mayor due respect.

Eyre Justice. I think the *mandamus* is good, for as to the want of title, here is as much set out as is done in the case of corporation officers, where they only say *debito modo electus*. As to the main point, I think a *mandamus* is very proper to admit a man to the exercise of his office; and that if a common-councilman, after swearing in, should be denied admission into the council-room, he might have a writ for that purpose. And I take Dr. *Sherlock*'s case to be the same with this, for he was prebendary by virtue of the act of Parliament, without any further ceremony, and had the same right to his seat and voice as this man has; and if a *mandamus* will not lie, I do not see what other remedy he has to get into his stall, unless it be by force.

As to the return it is certainly ill, for it is not the charter but their own by-law that gives them power to administer the oath: in the case of corporations where the charter doth not impower any body to give the oath, they are forced to get a *dedimus* out of Chancery. Neither is the by-law well set out, for it is only *inter statuta ordinatum est*, without shewing when or by whom it was made. Where the charter gives no power to administer the oath of office, there must be a *dedimus* for that purpose.

This entry of the award of a peremptory *mandamus* is no judgment, for want of *consideratum est*, which should have been in. *Mich.* 10 *W.* 3. *rot.* 83. the writ recites, that the return was held insufficient, *per quod consideratum fuit, quod fieret breve de peremptorie mandamus tam in complemento judicii quam in executione ejusdem.* 16 *Car.* 2. *rot.* 135. *Rex* v. *Majorem de Maidstone.* 29 *Car.* 2. *rot.* 44. *Mich.* 3 *W.* 3. *rot.* 139, 142. 7 *W.* 3. *rot.* 60. are all so. But I do not find they ever entered up a formal judgment.

This award therefore of a peremptory *mandamus* is a judgment of which error will lie; and the party will have the effect of it in superseding the writ, if reversed.

Fortescue

Fortescue Justice. I think it is hard to maintain, that a writ of error will lie, becaufe without *ideo confideratum eft* it is no judgment: it is againft the nature of *mandamus*'s, which are *feftinum remedium*, and great inconveniencies will follow, where the writ is to deliver the *infignia*, or publick records. *Ryly* fays they were formerly no more than letters, and now the difobedience of them is only a contempt. Entries are made of contempts, and yet I believe error was never brought. *Bag's* cafe was the firft judicial *mandamus*, and till 12 *W.* 3. they were never entered of record, when a rule was made, that they fhould be entered of the fame term they come in.

As to the point of the *mandamus*, I am inclined to be of my Lord Chief Juftice's opinion, that it will not lie where there is a legal poffeffion, and there was not that in *Sherlock*'s cafe, for he was never fworn.

It was afterwards argued a fecond time time *Pafch.* 8 *Geo.* when *Wearg pro quer' in errore* made two points, 1. Whether the writ of error lay: and, 2. Admitting it did, whether the judgment was erroneous.

As to the firft point, appeals are a privilege much favoured by law, and therefore a new erected jurifdiction is not exempt from them. *Salk.* 263. A *mandamus* is now become a formed writ, and like other writs muft bear *tefte* in term. 2 *Keb.* 91. It is like a civil action, the party muft fhew a title, and the return muft either admit or deny it, and when the proceedings are clofed, the judgment is entered with an *ideo confideratum eft*. A writ of error lies upon a fine, and yet that is only an agreement of the parties upon record.

The rights that are determined upon thefe writs are many times of an high nature, and are of confequence to the publick in keeping out an improper, or bringing in a rightful officer: and it is of confequence likewife to the party himfelf, who has his private right bound by fuch a determination as is made upon this writ.

It was objected, that if error will lie upon the award of the peremptory *mandamus*, it may as well lie upon the firft writ, and then the delay would be infinite. But I take it to be no confequence, that if it lies on the laft, it muft lie alfo on the firft; for I look upon that to be of the nature of an interlocutory judgment, of which error will not lie, but the party muft ftay till the caufe is clofed.

The

The inconvenience of delay may be avoided, by conftruing this writ of error to be no *fuperfedeas*, as they did in the cafe of *Strode* v. *Palmer*, *Lill. Entr.* 248. and in many other inftances, which might be put. 1 *Mod.* 285, 106. 1 *Vent.* 266. 2 *Lev.* 120. 1 *Sid.* 184, 44. Ante, 105, 537.

But then it is objected, if it be no *fuperfedeas*, to what purpofe fhould you bring it? Anfwer; to have him turned out again, if the judgment be reverfed: that reverfal may put him in the fame condition as when he brought the writ.

2. Taking it therefore for granted, that a writ of error will lie, I fhall proceed to fhew wherein the judgment is erroneous. It will be admitted, that if the original *mandamus* ought not to have been granted, then every thing done upon it muft fall. A *mandamus* is not to give a right, but only a capacity of afferting it, which the party cannot do till he has a legal poffeffion; if he has that, it is all the writ can give him, and then he ftands in no need of any writ. In this cafe it appears, the party was in poffeffion of the office, which gave him a right to his ftall and voice, and he might as well have taken the writ to the verger or the fexton, or to have a houfe, or his dividend; in which cafes he having fuch a right as will enable him to maintain an action, the law leaves him to that. Dr. *Sherlock*'s cafe is widely different, for there the letters patent were no more than a ftanding nomination, which left the right of admiffion in the dean and chapter as it was before, and fo was no more than the common cafe upon a bare nomination or election; but the party here has at the time of fuing out the firft *mandamus* all that which Dr. *Sherlock* did not enjoy till the peremptory *mandamus* gave it him.

Pengelly Serjeant *contra*. That the *mandamus* well iffued, and that the writ of error would not lie.

As to the *mandamus*, it appears that *Dowgate* has a right to a ftall, and in confequence of that he muft have a remedy to come at it. It is not pretended, that a *quare impedit* will lie, nor can he bring an affife, he having the office already, and that for which he is contending, being only a particular privilege annexed to it. He cannot have an ejectment, it not being fuch a thing whereof the fheriff can give poffeffion; nor will an action upon the cafe anfwer his purpofe, becaufe in that he cannot recover his ftall, but only damages for being kept out,

As therefore he can have none of thefe remedies, he is under a neceffity of praying a *mandamus*, which lies for him on behalf of the crown, as he is an officer appointed by the royal charter.

I wonder to hear it faid we are already in poffeffion of every thing the writ can give us, when it appears by the writ and return, that though we are archdeacon, yet we have no fort of poffeffion of this particular franchife. In the cafe of the *infignia* the officer is not without remedy, if a *mandamus* fhould not be granted, for no doubt he may maintain an action of trover; but the reafon you do not put him to that is, becaufe damages will not anfwer the purpofe, which reafon holds equally in our cafe. 1 *Lev.* 119. a *mandamus* was granted for fuch a privilege as this annexed to an office, for that was to give an alderman his precedency. 1 *Vent.* 188. 2 *Roll. Rep.* 482. *Pal.* 51. It is no objection, that this office is of a fpiritual nature. Sir *T. Jones* 199. *F. N. B.* 34. *D.* a writ to induct to a ftall.

2. Whether the *mandamus* was well granted or not, will be immaterial here, if I fhew that no writ of error will lie upon it. It can be of no confequence or inconvenience if error does not lie, becaufe the *mandamus* neither gives, nor concludes the right. Suppofe there fhould be a reverfal, who can pray that the party may be put out again? Error will not lie on a *habeas corpus*. 8 *Co.* 127. Nor on a fine impofed by the court; and yet thefe may be matters of great confequence to the parties: here is no body elfe contending for this ftall, or who can demand a reftitution; and if it had ever been imagined a writ of error would lie, we muft have met with it before now.

Wearg replied. The reafon why the party cannot bring a *quare impedit* is, becaufe that is not his proper remedy, which he muft feek by action upon the cafe. A *mandamus* will not lie to command the providing neceffaries upon a vifitation, but the party muft fue for procurations. In the cafe of precedence the alderman could have no action, and therefore the *mandamus* might be proper.

Adjournatur; and this term it was argued *ex parte defendentis in errore* on the fingle point of the writ of error, upon which only the court delivered their opinions.

Chief Juftice. This caufe being argued *ex parte*, I fuppofe the plaintiff in error gives it up. Several matters have been ftirred in the cafe, which might deferve confideration, if we could properly come at them; but as we are all of opinion that the

writ of error does not lie, it is not neceſſary to enter into debate of them. A writ of error is calculated to reſtore the ·y to ſomewhat that is loſt; the *mandamus* gives no right, even a right of poſſeſſion; ſo that if the judgment ſhould be ·ſed, ſtill the ſame right would ſubſiſt in him, which makes reverſal ſignify nothing. To which *Powys* Juſtice agreed. *per Eyre* Juſtice, A writ of error only lies on what is pro·y a judgment, which this is not. I was indeed inclined hink it a judgment from the entries that I mentioned for·ly; but upon looking further into it, I find that the entries, ·re returns have been allowed, do not warrant that opinion, they are without an *ideo conſideratum eſt*. In all *procedendo's* entry is with an *ideo conſideratum eſt*, and yet it is certain or will not lie, neither will it on the return of a reſcue. The ry in the caſe of the *Ayleſbury* men is, *Super quo viſis et per iam hic plenius intellectis omnibus et ſingulis praemiſſis, pro eo d videtur curiae hic quod cauſa captionis et detentionis ſupranominati* B. *non pertinet ad hanc cur.' ideo remittitur*, without an *ideo ſideratum eſt*; which entry was made on great conſideration, d is an argument the judges thought that not to be a caſe lievable by writ of error. *Et per Forteſcue* Juſtice, Entries *mandamus's* are of late date; perhaps in *Ireland* they do not ter them yet: the party cannot reverſe this return, and why en ſhould he bring a writ of error? There would be no end proceedings, if all ſorts of officers that are intitled to a *ndamus* ſhould be hung up by writs of error. *Per curiam:* ıe writ of error muſt be quaſhed.

Afterwards a writ of error was brought in Parliament, and the judgment of *B. R.* in *England* affirmed with 60 *l.* coſts. *Forteſc.* Rep. 329.

Hilary

Hilary Term, 1722-3.

9 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Justice.*

Sir Littleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Justices.*
Sir John Fortescue Aland, *Knt.*

Sir Robert Raymond, *Knt. Attorney General.*
Sir Phillip Yorke, *Knt. Solicitor General.*

Between the Pariſhes of Burleſcome *and* Sampford Peverell.

Executing the office of tithingman gains a ſettlement.

THE ſeſſions on a ſpecial order adjudge, that executing the office of tithingman would not gain a ſettlement. *Et per curiam*, The order muſt be quaſhed, for this is an annual office in the pariſh within the words and meaning of the act of Parliament.

Between the Pariſhes of St. Michael in Bath *and* Nunny in com' Somerſet.

Order to remove a married woman is good unleſs it appears ſhe is ſent from her huſband.

ORDER of removal, reciting that the wife of *B.* who is now living, and *C.* his child, had intruded, *&c.* and were likely, *&c.* and that the place of ſettlement of the wife and child was in *St. Michael*, they are therefore removed thither. It was moved to quaſh the order, becauſe it did not appear, the

2

e husband was at the time of the removal in the parish of . *Michael*, so that it may be they sent the wife away from e husband. *Sed per curiam*, We cannot intend he was not. he was in the parish from which she was sent, that indeed ould vitiate the order: but as neither of these facts appear against e order, to satisfy us that it is bad, we are not to presume it be so, and therefore it must be confirmed.*

* See 1 Bur. Rep. 308.

Hodgkins et ux' *versus* Corbet et ux'.

Words tantamount are within the custom of London. Ante, 471. 8 Mod. 114.

WORTHEY moved for a prohibition for these words spoken in *London*, " You are a cuckoldly dog, and bid the bitch your wife come out"; and cited *Hil.* 12 *Ann.* *Evans* *Horwood*, where " She is with child," spoken of a single oman, was held tantamount to calling her whore, and a prohiion went. So *Pas.* 1 *Geo.* *Wilborn* v. *Coddy*, the wife libelled calling her husband cuckold, and a prohibition was grant. *Et per curiam*, Formerly it was held that words tantaount were not within the custom, but the later resolutions ve denied that case in *Lutw.* 1042. And *Mich.* 11 *W.* 3. *R.* *Smith* v. *Glass*, the words spoken in *London* were, She was never married, and what is her hopeful son;" and the opinion of the whole court there was a prohibition. ere must be a prohibition in this case.

Alcock *versus* Carter.

Under what circumstances the court will allow want of warrants of attorney to be assigned on a writ of error out of *Ireland*.

MR. *Atwood* moved the common motion to set aside so much of the assignment of errors in a cause out of *Ireland*, related to the want of a warrant of attorney; which was osed by *Strange*, who produced an affidavit sworn before of the Judges in *Ireland*, with a certificate from the proper cer, that there was no warrant filed; and also an affidavit the agent here that he received both from *Ireland*, and beed them to be authentick; and insisted that it now appearing y were not sham errors assigned merely for delay, the reason n which the common motion is made failed. *Et per curiam*, is is sufficient to satisfy us that there is some foundation for sending a *certiorari*, and therefore the errors must stand, *ange* moved for time till the next term to return a *certiorari*, ich was granted accordingly.

Payne *versus* Fry.

The clerks of a prothonotary of *C. B.* are not intitled to privilege.

THE defendant pleaded in abatement, that he was one of the clerks of Sir *G. Cooke*, prothonotary in *C. B.* and *Squib* moved to set it aside. Upon a rule to shew cause, *Strange contra* produced the affidavit annexed to the plea, wherein the defendant swore, that he served his clerkship with a Common Pleas attorney, and that he had for many years acted as an attorney or solicitor, and followed no other employment. And after consideration the court set aside the plea, being all of opinion, such clerks had no privilege at all, they not being sworn as attornies are, nor ever acting as clerks in the prothonotary's office. And that it was not sufficient for the prothonotary to enter their names in his book. As to such clerks as were actually employed under him, for so long as they continued in that employment, they would be privileged, but no longer; as in the case of a Judge's clerk; and an old rule 8 *Car.* was cited, where they were restrained from practising as attornies.

Dominus Rex *versus* Gage.

5 Ann. c. 14
8 Mod. 63. S.C.

THE defendant was convicted on 5 *Ann. c.* 14. for using a greyhound in killing four hares, *per quod* he forfeited 20 *l.*

Where justices have power to convict on oath of one witness, they may convict on the confession of the party.

Reeve excepted in the conviction, that the act of Parliament had only given the justices jurisdiction to convict upon the oath of one or more credible witnesses, whereas this was upon his own confession, which he insisted the justices had no power to take; and it follows in the act, that the person so convicted shall forfeit, which word *so* is relative to the former method by oath of one or more credible witnesses: and he put the common case upon the removal of a poor person, which must be upon complaint of the churchwardens or overseers, the justices having jurisdiction only in that manner.

Sed per curiam, (*praeter Eyre* J.) The conviction must be confirmed. The intent of mentioning the oath of one witness was only to direct the justices, that they should not convict on less evidence: suppose the confession had not been before the justices, but before two witnesses who had sworn it; that would be convicting him on the oaths of witnesses, and yet the evidence would not be so strong as this. By the civil law confession is esteemed the highest evidence, and in some cases, though there are one hundred witnesses, the party is tortured to confess. Here the justices had a better evidence

an the oath of any ſingle witneſs, and it is a monſtrous ing to ſay that a better ſort of evidence ſhall not do.

Eyre J. *contra*, thought there was no occaſion to carry this t of Parliament ſo far, the 22 & 23 *Car*. 2. *c*. 26. giving power convict for this offenſe upon confeſſion, with a different nalty, and that it ought to have been a conviction upon that itute. The conviction was confirmed.

Dominus Rex *verſus* Sarah Saliſbury.

SHE was committed to *Newgate*, for ſtabbing a gentleman with a knife, ſo that his life was deſpaired of: and having otained a *habeas corpus* out of the King's Bench, the day before ſhe was to be brought up ſhe moved, that a phyſician and rgeon of her own nominating might be permitted to be preſent at the dreſſing the gentleman's wound, ſo as to be able ſatisfy the court that he was out of danger, in order that they ght bail her *Sed per curiam*, There never was a motion of s nature, eſpecially ſo early as this is; the courſe is, for the ends of the party injured to lay his condition before the court ien they oppoſe the bailing: if they do not do it, then we iy order ſuch an attendance for our own ſatisfaction; but at eſent the defendant has no right to demand it. Practice.

Dominus Rex *verſus* Harvey et al'.

UPON a motion for an information againſt the defendants, to ſhew by what authority they acted as burgeſſes, ving never been admitted; the only act alleged was, their ting for Parliament men at the laſt election. The defendants affidavits ſhewed they were inhabitants of the borough, and it as ſuch they had a right to vote, though they were no burſſes; but did not deny their voting as if they were burgeſſes. *r curiam*, Since they had a right to vote, we will not inquire to that queſtion, which is more properly determinable in the ouſe of Commons. The rule was diſcharged. The court will not grant information where the only acting is voting for Parliament men.

Mr. Dottin's caſe.

HACKET agreed to aſſign a leaſe to *Sutton*, who ſent for *Dottin* an attorney to take the deeds and peruſe them. *ttin* drew an aſſignment, and then *Sutton* paid him for it and k back the deeds. And now *Hacket* moved for a rule on *Dottin* In what caſes the court will order an attorney to deliver deeds.

N n 2

Dottin, to deliver him the deeds. But upon laying the cafe before the court, they would make no rule upon the attorney, it appearing to be a fair tranfaction in delivering back the deeds to his own client.

Lord Coningfby's cafe.

No new ejectment to be brought till cofts paid of the firft. 8 Mod. 20.

HE brought an ejectment, and had rule for a trial at bar; but it being upon the demife of a wrong perfon, he delivered new ejectments, and coming again for a trial at bar, the court would not grant it, but upon payment of cofts of the former ejectment.

James *verfus* Hatfeild.

At Guildhall, coram King *C. J.*

What the guardian faid admitted as evidence againft the infant.

AN infant brought an action of affault, and declared *per guardianum*. And to prove that his witnefs was the promoter of the caufe and at the expence of it, the Chief Juftice allowed the defendant to give the guardian's declaration to that purpofe in evidence, he being a perfon liable to cofts.

Eafter

Eafter Term.

9 Georgii Regis. In B. R.

r John Pratt, *Knt. Lord Chief Juftice.*

r Littleton Powys, *Knt.*
r Robert Eyre, *Knt.* } *Juftices.*
r John Fortefcue Aland, *Knt.*

r Robert Raymond, *Knt. Attorney General.*

r Philip Yorke, *Knt. Solicitor General.*

Bailee *verfus* Vivafh.

trefpafs for taking away goods the defendant pleaded ·nder of amends, and on demurrer judgment was given for ıe plaintiff: the 21 *Jac.* 1. *c.* 16. giving fuch plea only cafe of an involuntary trefpafs with a difclaimer, and fo *'oll. Abr.* 570. **Amends not pleadable to a voluntary trefpafs.**

Dominus Rex *verfus* Wells.

HE court granted a *certiorari* for the defendant to the *Old Bailey* to remove an indictment for forgery; the de- ıt appearing to be a man of good repute, and the profe- ı upon flight grounds. **Indictment removed from *Old Bailey*.**

Macdonnel *versus* Welder.

Hil. 9 Geo. rot. 273.

An entry before the commencement of the lease will not avoid the payment of the rent reserved. 8 Mod. 54.

IN replevin the defendant avows for rent under a lease dated 24 *June*; *habendum a praed'* 24 *die Junii*, &c. *virtute cujus* the plaintiff entered the said 24th of *June*.

On demurrer in *C. B.* it was objected, that the plaintiff was a disseisor by entering the 24th, when the lease was not to commence till the next day, and consequently the possession was not under the lease, but by virtue of a tortious fee.

But after consideration, judgment was given for the avowant; the court being of opinion, there was a great difference between this case, and an ejectment, where the plaintiff who claims a term does at the same time shew he has gained a tortious fee; whereas here, be the entry tortious or not, it cannot discharge the contract for payment of the rent. *Cro. El.* 169. 2 *Leon.* 99. 1 *Roll. Abr.* 65. The judgment of *C. B.* was affirmed.

Hollister *versus* Coulson.

A *latitat* prevents the statute of limitations. 1 S.d. 53, 60. Sty. 156. L. Raym. 1441. *Post*, 736.

THE defendant pleaded *non assumpsit infra sex annos*; the plaintiff replied a *latitat*; and the court on demurrer held it well enough, without shewing a bill of *Middlesex*. *Judicium pro quer'*.

Hayward *and* the Bank of England.

In what time a goldsmith's bill must be tendered.

THE plaintiff, who kept cash with the Bank, on *Saturday* left a note for 50 *l.* on *Cox* and *Cleeve*: on *Monday* they gave it to the runner, who left it at the shop in the morning, where they cancelled the note; but when he called in the afternoon for the money according to his usual practice, he found the bankers had stopt payment; whereupon he took a new note of the same tenor and date. And *King* C. J. directed the jury, that it would be dangerous to suffer persons to deal with notes in this manner, and said the Common Pleas was of that opinion in the like case. But however he directed they should only find the value of the note when cancelled, upon which the jury found 25 *l.* the goldsmiths having paid 10 *s.* in the pound.

Thompson

Thompson *versus* Berry. In C. B.

TRESPAS for breaking his close and chasing his bull. Verdict for the plaintiff and 1 *s*. damages. And the question was, if he should have any more costs than damages; and held by the court that he should have his costs, because the 22 & 23 *Car*. 2. *c*. 9. extends only to such actions of trespass where the freehold may probably come in question. *Vide Raym*. 487. 3 *Mod*. 39. And how could the freehold come in question upon chasing of a bull?

Where no more costs than damages. Gilb. Eq. Rep. 197. See 4 *Bur*. Rep. 1282.

Rawbone *versus* Hickman.

IT was moved in arrest of judgment, that the record was, *et praed' querens* (instead of *def*.) *similiter*, so no issue joined: but the court held it was aided. *Cro*. *El*. 435, 904. And *Mich*. 5 *Geo*. 2. on the authority of this case the court would hear no argument on the like objection.

Jeofail.

Trinity Term.

9 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Justice.*
Sir Littleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Justices.*
Sir John Fortescue Aland, *Knt.*
Sir Robert Raymond, *Knt. Attorney General.*
Sir Philip Yorke, *Knt. Solicitor General.*

Anonymous.

Mandamus to commit administration.

STRANGE moved for a *mandamus* to the official of the Bishop of *Gloucester*, to commit administration to the widow of an inteftate. *Sed per curiam*, That will be to deprive the ordinary of his election, in granting it to her, or the next of kin; therefore take your *mandamus* generally, to grant administration of the goods of the inteftate.

Dominus Rex *versus* Hotch.

Indictment on 5 *Eliz.*

MR. *Eyre* moved to quash an indictment on 5 *Eliz. c.* 4. where it was averred to be a trade used at that time in *Great Britain*, instead of *England*; and after a rule to shew cause it was made absolute without opposition.

Trin. 13 *Geo. Rex.* v. *Parish*, another quashed on the authority of this case.

Dominus

Dominus Rex *versus* Athoe senior' et junior'.

THE defendants were convicted at *Hereford* assizes for a murder committed in *Pembrokeshire*, which is an ancient *sh* county, and no part of the lordships marchers in *Wales*; at the assizes they moved in arrest of judgment, that the *H.* 8. *c.* 6. did not extend to all the principality of *Wales*, only to the lordships marchers, where the inconvenience was recited, to be: Mr. Justice *Fortescue*, before whom were tried, thinking it proper, a point of so great consence should be solemnly determined, ordered a *certiorari* and *as corpus* to be brought, by virtue of which the defendants the conviction were both brought before the court of *B. R.* l after hearing of counsel on both sides, and consideration he several statutes of 26 *H.* 8. *c.* 4. 26 *H.* 8. *c.* 6. and & 35 *H.* 8. *c.* 26. the whole court were unanimously of ion, that the Judges of assize in the next adjacent *English* nty had a concurrent jurisdiction throughout all *Wales* with justices of the grand sessions; and consequently the defends were well tried at *Hereford*. The defendants thereupon reed sentence of death, and being in the custody of the mar-, were executed at the watering-place by *Kent-street*, being usual place of execution for his prisoners.

Murders and felonies in any part of *Wales* may be tried in the next *English* county. 8 Mod. 135.

See ante 502. marg.

Lilley *versus* Hedges.

THE plaintiff brings an action against *Hedges* only, on a covenant entered into by him and *Griffin*, "that they and each of them will account for all rents that they or either of them shall receive of the plaintiff's estate;" and gns the breach, "that *licet Hedges* and *Griffin* received 7000*l.* yet they nor either of them ever accounted."

Where the covenant is joint and several, in an action against one only the breach may be assigned in the neglect of both. 8 Mod. 166.

After verdict for the plaintiff, *Wearg* moved in arrest of judgnt, that though the plaintiff had an election to bring either oint or separate action; yet this was neither joint nor eral, being against one only, for the neglect of both. *Sed curiam*, The action is well brought. Perhaps the other ver sealed the deed: and it is no new thing for one man to venant for the act of another. The plaintiff must have judgnt.

See 2 Bur. Rep. 1190.

Between

Between the Pariſhes of Allhallows on the Wall *and* St. Olave in Surrey.

A. is bound to *B.* but ſerves *C.* his ſettlement is in *C.*'s pariſh. See 1 Bur. Rep. 306. Seſſ. Caſ. 275. pl. 215. Caſ. of Set. and Rem. 116. pl. 153. 8 Mod. 168. Ante, 10.

UPON a ſpecial order of ſeſſions, the caſe was ſtated, "that " an apprentice was bound to *A.* in one pariſh, but by " agreement ſerved *B.* in another pariſh:" and the ſeſſions ſettle him with *B.*

Et per curiam, The order muſt be confirmed. This is exactly the caſe that was in this court, *Mich.* 3 *Geo. between the pariſhes of Holy Trinity* and *Shoreditch*, where *Ferrer* was bound to *Truby* with intent to ſerve *Green* (as he did): and the court, upon a ſpecial reſolution, adjudged the ſettlement to be with *Green*. *Ante*, 10.

Grumble *verſus* Bodilly.

Where there is judgment *pro def.* in ejectment, coſts ſhall be paid before a new one brought. 8 Mod. 225.

THERE was a verdict for the defendant in ejectment, and the plaintiff brought a writ of error, and a new ejectment. And it was moved to ſtay the proceedings in the ſecond ejectment, till the coſts of the firſt were paid. *Salk.* 255, 258. *Et per curiam*, Unleſs the plaintiff can ſatisfy us, that the writ of error is brought with ſome other view than to keep off the payment of coſts, we will not ſuffer the plaintiff to proceed in his new ejectment. And he not ſhewing any thing elſe, the proceedings were ſtayed, unleſs coſts paid in a fortnight.

Woolley *verſus* Briſcoe.

Surpluſage. 8 Mod. 173.

IN a ſtock cauſe the defendant pleaded that the contract was not regiſtered before the firſt of *November* 1720, *ſecundum formam ſtatuti in hujuſmodi caſu editi et proviſi.* The plaintiff replies, that it was regiſtered *ſecundum formam ſtatuti*; upon which they are at iſſue, and it is found for the plaintiff.

It was moved in arreſt of judgment, that this was an immaterial iſſue, becauſe the act of Parliament does not require ſuch regiſtry till the firſt of *November* 1721, and then the plea being only to the firſt of *November* 1720, upon which the iſſue is joined, the jury could not find it to be regiſtered according to the directions of the ſtatute.

Sed per curiam, The time was impertinently mentioned in the plea; the iſſue is joined upon that part which is only material, *viz.*

iz. the regiſtry *ſecundum formam ſtatuti*, and therefore the reſt muſt be rejected as ſurpluſage. If not, then the replication is ill, and ſo is the plea, and then the declaration muſt ſtand, and the plaintiff have judgment.

Dominus Rex *verſus* Ford.

CONviction on 3 *Car.* 1. *c.* 3. for keeping an alehouſe without licence: and *Forteſcue* objected, that in the act there is a proviſo to exempt perſons who have been puniſhed by the former law of 5 & 6 *E.* 6. *c.* 25. and therefore it ſhould have been ſaid he had not been proceeded againſt upon that act.

Conviction for keeping an alehouſe. Seſſ. Caſ. 264. pl. 208. 8 Mod. 174.

Sed per curiam, That coming in by way of proviſo, he ſhould have inſiſted on it in his defence; it appears he was aſked what he had to ſay, and therefore we may reaſonably preſume he had no ſuch defence to make. The conviction was confirmed.

Dominus Rex *verſus* Robbiſon major' de Helſtoun.

SERJEANT *Pengelly* moved for a *mandamus* to him, to proceed to an election of a new mayor upon the next charter day; it appearing by affidavit, that under a clauſe for holding over he had been in poſſeſſion four years; and it being doubtful whether, where there is a charter day, there can be an election at any ſubſequent day, the court granted the *mandamus*.

Mandamus to proceed to election where a clauſe for holding over. See ſtat. 11 G. 1. c. 4.

Cook *verſus* Wingfield.

THE word *ſtrumpet* was held to be within the cuſtom of *London*; but the defendant not coming for a prohibition till after ſentence, the court denied a prohibition on the authority of *Argyle* v. *Hunt*, though it appeared on the libel to be ſpoken in *London*.

Strumpet tantamount to whore. Andrews 300. S. C. 8 Mod. 176. Forteſc. Rep. 347.

Dominus Rex *verſus* Inhabitantes de Little Dean.

IT was ſtated, that a man took a leaſe for ſeven years, and objected that it might be only by *parol*, and then it is void for the whole, and there can be no ſettlement. *Sed per curiam*, Then it ſhould have been ſtated to be by *parol*; we muſt take it to be by deed, otherwiſe it is no leaſe at all. Order confirmed.

The court will preſume a leaſe to be by deed.

Gray

Gray *versus* Mendez.

Mich. 9 Geo. rot. 346.

The ſtatute of limitations runs notwithſtanding a bankruptcy. 8 Mod. 171, 172.

CASE by the aſſignee of the commiſſioners of bankruptcy, the defendant pleads *non aſſumpſit infra ſex annos*, to which the plaintiff replies the bankruptcy, and aſſignment, and that the cauſe of action aroſe within the ſix years, before the aſſignment.

On demurrer the court held the replication to be ill, becauſe when the ſix years were once begun, the ſtatute runs over all *meſne* acts, ſuch as coverture, and infancy, in the caſe of a fine. 1 *Lev.* 31. And it would be to defeat the ſtatute, as to all ſimple contracts, if an aſſignment at the end of five years and an half was to ſet all at large again. *Judicium pro defendente.*

Horſpoole *verſus* Harriſon.

A trader may be ſued by his degree, and the writ ſhall not abate unleſs he pleads another degree. cited in 2 R. Raym. 1541.

IN an action by original againſt the defendant as of ſuch a place yeoman, he pleaded in abatement, that he was a lime merchant, and not a yeoman: and on demurrer the court held it an ill plea, and awarded a *reſpondes ouſter*, upon this ground, that every man, be he a trader or not a trader, has a degree by which he may be denoted; and having a degree, (if he has a trade likewiſe) it is in the election of the plaintiff to ſue him by one or the other; and if he ſues him by his degree, it is not enough for the defendant to ſay he is of ſuch a trade, becauſe he does not give the plaintiff a better writ. In this caſe therefore the defendant ſhould have ſhewn himſelf to be of a degree higher than a yeoman, and that would have abated the plaintiff's writ, and have given him a better. This was ruled upon the authority of a former caſe, where a man was ſued as yeoman, and he pleaded he was a horner, and the court awarded a *reſpondes ouſter*.

Jones *verſus* Pearle.

Paſ. 9 Geo. rot. 21.

Innkeeper cannot ſell the gueſt's horſe for keeping, except in *London*.

IN trover for three horſes, the defendant pleaded, that he kept a publick inn at *Glaſtenbury*, and that the plaintiff was a carrier and uſed to ſet up his horſes there, and 36*l.* being due to him for the keeping the horſes, which was more than they were worth,

worth, he detained and sold them, *prout ei bene licuit*: and on demurrer judgment was given for the plaintiff, an innkeeper having no power to sell horses, except within the city of *London*. 2 *Roll. Abr.* 85. 1 *Ven.* 71. *Mo.* 876. *Yel.* 67. And besides, when the horses had been once out, the power of detaining them for what was due before did not subsist at their coming in again.

Acheson *versus* Fountain.

Mich. 9 Geo. rot. 363.

UPON a case made at *nisi prius coram Pratt* C. J. it appeared that the plaintiff had declared on an indorsement made by *William Abercrombie*, whereby he appointed the payment to be to *Louisa Acheson*, or order: and upon producing the bill in evidence, it appeared to be payable to *Abercrombie* or order; but the indorsement was only in these words, "Pray "pay the contents to *Louisa Acheson*;" and therefore it was objected, that the indorsement, not being to order, did not agree with the plaintiff's declaration. (The order of an indorsee may sue on a general indorsement to him only.)

But upon consideration, the whole court were of opinion, it was well enough, that being the legal import of the indorsement; and that the plaintiff might upon this have indorsed it over to another, who would be the proper order of the first indorsor. *Judicium pro querente.* (See 2 Bur. Rep. 1216.)

The King *against* the Chancellor, Masters and Scholars of the University of Cambridge.

MANDAMUS to restore *Richard Bentley* to his academical degrees of batchelor of arts and batchelor and doctor of divinity. (*Mandamus.* L. Raym. 1334. Fortesc. Rep. 202. 3 Bac. Abr. 532. Andr. 177. 8 Mod. 148.)

To this they return, that the university of *Cambridge* is an ancient university, and a corporation by prescription, consisting of a chancellor, masters and scholars, who time out of mind have had the government and correction of the members, and for the encouragement of learning have conferred degrees, and for reasonable causes have used to deprive. That time out of mind there has been a court held before the chancellor or vice-chancellor for the determining of all civil causes where one of the parties was a member of the university. And that Queen *Elizabeth* by letters patent 26 *April*, 3d year of her reign, granted them conusance of pleas, and to be a court of record, and several other clauses of the charter are set out, upon which

no queſtion ariſing, they may be omitted. That 13 *Eliz.* this and all other charters of the univerſity were confirmed by act of Parliament. That at a court held 23 *September* 1718, according to the uſage of the univerſity, before *Thomas Gooch*, D.D. the then vice-chancellor, one *Conyers Middleton*, D.D. a member of the univerſity, levied a plaint in debt for 4*l.* 6*s.* againſt the ſaid *Richard Bentley*, and prayed proceſs againſt him. That thereupon, according to the cuſtom of the univerſity, a proceſs iſſued to *Edward Clark* the beadle, to compel the ſaid *Bentley* to appear at the next court. That before the return the beadle waited upon *Bentley* at his lodgings within the juriſdiction, and ſhewed him the proceſs, and ſerved him with it: and upon diſcourſe between them concerning the proceſs and the vice-chancellor, *Bentley* contemptuouſly ſaid, the proceſs was illegal and unſtatutable, and that he would not obey it; that he took the proceſs out of the hands of the beadle, ſaying the vice-chancellor was not his judge, *et quod praed' procancellarius ſtulte egit.* That at the next court held 3 *October* 1718, *Middleton* appeared, and declared in debt for 4*l.* 6*s.* and the regiſter of the court exhibited a depoſition of the beadle touching the contempt, which being read, the ſaid *Richard Bentley*, according to the uſage of the univerſity, was ſuſpended *ab omni gradu ſuſcepto.* That time out of mind there has been a cuſtom for the chancellor or vice-chancellor to ſummon a congregation, conſiſting of ſuch and ſuch particular members, who are ſpecified in the return, who have uſed to examine and determine all matters relating to the univerſity, and to take away degrees for contumacy or reaſonable cauſe. That a congregation was held 17 *October* 1718, when the vice-chancellor declared the whole matter to them, and deſired their judgment upon it, after which having read the depoſition and the ſeveral acts of court, a certain grace was propounded, according to the uſage of the univerſity, in theſe words, *Cum reverendus vir Richardus Bentley collegii Trinitatis magiſter, ad ſummos in hac univerſitate titulos et honores veſtro favore dudum promotus, adeo ſe immemorem et loci ſui et veſtrae authoritatis dederit, ut debite ſummonitus ad comparendum et reſpondendum in cauſa coram procancellario, obedientiam recuſaverit, miniſtrum univerſitatis ſummonentem indignis modis tractaverit, procancellarium et capita collegiorum opprobriis impetiverit, juriſdictionem denique univerſitatis longo uſu, Regiis chartis, et authoritate Parliamenti ſtabilitam, pro nihilo habendam eſſe declaraverit; cumque idem Richardus Bentley ſuper his cauſis ab omni gradu ſuſpenſus fuit, et poſtea per tres dies juridicos expectatus, comparere tamen neglexerit; placeat vobis ut dictus Richardus Bentley ab omni gradu, titulo et jure in hac univerſitate dejiciatur et excludatur: et ſuperinde per ſententiam et conſiderationem dictae congregationis ab omni gradu, titulo et jure in eadem univerſitate dejectus et excluſus fuit.*

That

That he has not yet submitted himself to the authority of the niversity, *Et his de causis salva authoritate academica*, they canot restore him.

Cheshyre Serjeant *pro Rege*. The matter of the writs issuing aving been argued upon the rule to shew cause why there hould not be a *mandamus*, I shall say nothing as to the writ itelf; but taking it to have well issued, I shall proceed to conider, whether this return be sufficient to hinder the awarding a peremptory *mandamus*.

The return I take to be an insufficient return, and therefore a peremptory *mandamus* ought to go.

As this is not a case within the act of Parliament, it must be considered as a *mandamus* at common law, and the return must be certain to every intent.

That this writ is not brought for a small matter, I would just mention the consequence of the deprivation: there are many preferments and privileges which can only subsist in dignified clergymen, and some of them are mentioned in our statutes, 13 *Eliz. c.* 12. 17 *Car.* 2. *c.* 3. § 6. So that now these degrees, which at first were only titles of honour, (*Seld.* 326 to 333.) now affect men in their freeholds and possessions.

The defendants have shewn themselves to be a corporation by prescription, and as such they are under the controul of this court, and therefore they, as all other corporations, must shew the removal to be for a reasonable cause, and that the proceeding has been in a legal manner.

But this we say is neither a reasonable cause, nor a legal proceeding.

As to the reasonableness of the cause, I think the whole will come under these four heads, and if neither of them will warrant the suspension (for I am now upon that only) it will be admitted to be illegal. 1. The first is, that *Bentley* said, the process was illegal. 2. That he declared, the vice-chancellor was not his judge. 3. That he acted rashly, *stulte egit*. And, 4. The taking away the process.

As to the first, in saying the process was illegal, do not the parties every day say as much of your proceedings in *Westminster-hall?* Is any thing more common than for a man to tell the court, they have given judgment *erronice*, or have charged him *minus juste?* You bear all this even where it is false in fact, and

and the judgment not erroneous; whereas in this caſe I am ſure the return has verified what was ſaid of the proceſs, that it was illegal. For, 1. It doth not appear whether the officer was to compel the appearance, by an arreſt of the body, or goods, or by diſtreſs infinite. 2. The plaint was in debt, and therefore it ſhould have been a ſummons. 3. It is to appear at the next court, without ſaying when it was to be holden; which objection has been often allowed. 2 *Cro.* 314. *Cro. El.* 105. 1 *Mod.* 81. 1 *Vent.* 181. *Raym.* 204. 1 *Roll. Abr.* 484. 4. It is not ſaid in the citation, at whoſe ſuit, or for what account, he was to appear. 6 *Co.* 54. Theſe are all good objections to the proceſs, and ſhew that *Bentley* was well juſtified in ſaying the proceſs was illegal; though if it was legal, I know no harm in any man's diſputing the legality of any proceſs whatſover.

2. He ſaid the vice-chancellor was not his judge. But could his denying that weaken the power of the vice-chancellor over him, if he was his judge? In theſe caſes they ought to have returned the occaſion of ſpeaking the words, which perhaps may very much alter the caſe.

3. He ſaid the vice-chancellor *ſtulte egit*. What we are to underſtand by that expreſſion, ſince they have not put an *anglice* to it, I cannot tell. It may ſignify that he has acted raſhly, or unadviſedly, or ſomething that is very innocent.

4. His taking the proceſs. I do not find that he did any more than aſk to ſee it, and ſo received it from the officer; it does not appear he did not give it him again, or that he took it out of the officer's hands without his conſent.

But now if all this charge againſt *Bentley* was true, yet it will never warrant the ſuſpenſion; admitting them to be improper expreſſions, yet for contemptuous words a man cannot be deprived. If he had ſaid ſo in court. perhaps he might have been committed; and as they were out of court, he might be bound to his good behaviour; but removals for words can never be juſtified. 1 *Vent.* 302. 2 *Cro.* 586. 1 *Vent.* 327. 3 *Keb.* 709, 811. *Cro. El.* 78, 689. *Mo.* 247. *Latch* 299. *Noy* 92. *Palm.* 451. In *Baggs*'s caſe he charged the mayor with acting fooliſhly (which is the moſt they can make of *ſtulte egit*); but it was held, they could not remove him for it.

But admitting all this againſt me, that there was a reaſonable cauſe of ſuſpenſion, yet if there be not likewiſe a legal proceeding, the ſuſpenſion will be void.

The

The first objection to the legality of the proceeding is, that the vice-chancellor had no sufficient evidence of the contempt; the register only exhibited *quasdam depositiones*, which doth not conclude them to be upon oath, for *depono* is a relative term, and must be applied.

But in the next place, if the word deposition should be thought to import the evidence to be upon oath, yet here is no authority to administer the oath set out in the return: the old books call such an oath *sacramentum fatuum*. 3 *Inst.* 167. *Yelv.* 72, 111. A master in Chancery must be averred to have power to administer an oath, or else the court takes no notice of it. *Latch.* 39, 133. 2 *Keb.* 284.

Another imperfection in the proceeding is, that here was no notice given to *Bentley*, to come in and defend himself against the contempt; if he had been there, he might have so far explained himself, as to have taken off the force of the expressions: he might have told them, It is true, I did say the process was illegal, and have shewn them wherein: he might have shewn that the vice-chancellor was not his judge, but that he was visitable by somebody else: and if you take *stulte egit* to signify no more, than that the vice-chancellor had acted rashly, it would have been easy enough for *Bentley* to have satisfied any body, but the vice-chancellor, of the truth of his assertion: and as to the charge about taking the process out of the hands of the officer, might not he have replied, though I took the process out of your hands, yet did not I give it you again, when I had looked upon it? All this would have been a very good defence, if they had given him an opportunity of making it.

But now to take it in the strongest manner, that he was utterly defenceless against every part of the charge, and that the charge will warrant his suspension; yet still there ought to have been notice: *quia quicunque aliquid statuerit, parte inaudita altera, aequum licet statuerit, haud aequus fuerit.* 11 *Co.* 99. 1 *Sid.* 14. 2 *Sid.* 97. *Sti.* 446, 453, 457, 478. I should not have cited these authorities to prove first principles, but only for the information of some who attend the argument of this cause.

The only matter which remains now to be considered is, what was done by the congregation in consequence of the vice-chancellor's suspension. If the suspension was illegal, what was done by the congregation will fall of course. If the suspension was legal, yet I shall insist the deprivation was not so.

The defendants themselves have shewn, that even this body is bounded by a restriction, to deprive only for reasonable cause. Now though the suspension, and the non-appearance for three court-days to submit himself (which by the way he was never called upon to do) will warrant a deprivation by the congregation; yet it is but reasonable that this accusation should be made out to them in a proper manner: and surely these gentlemen will never contend, that because Mr. Vice-chancellor *narravit* the contempt, and *petiit* the judgment of the congregation *de praemissis*, that this is sufficient to found the sentence upon. But they tell you, they inspected the acts of the court, and heard the depositions; perhaps there were no acts of court relating to this matter entered in the books; the expression is general, *inspectis actibus curiae*, without referring it to this case.

But further: If the suspension without notice could be got over, yet the deprivation never can. It was never imagined, that a member of a corporation, whose only privilege is perhaps to dine at the same table with Mr. Mayor, could be removed without a summons; and then *a fortiori* there ought to be one in this case, where the consequence will be the loss of several valuable preferments. It would be mispending your time, to cite cases to prove the necessity of a summons, and therefore I shall rest it upon the notoriety of the fact, which is every day's experience.

The defendants have founded their proceedings on custom, prescription, and act of Parliament, all subjects of the jurisdiction of this court; and if on the one hand they cannot restore him *salva authoritate academica*, on the other hand this deprivation cannot consist with the preservation of all rights, liberties, and rules of law, which the members of the university are intitled to as *Englishmen*.

Comyns Serjeant *contra*. The nature of the proceeding at the suit of Dr. *Middleton* is no more than an outlawry or excommunication, to compel the appearance of the party: *Excerpta ex Statut. Oxon.* printed in 1674. *tit.* 21. *de judiciis.* The return amounts to shewing a jurisdiction to hold plea, an action properly instituted against *Bentley*, his contempt to the court, for which he was suspended, and afterwards upon his non-submission deprived.

It is very true what my brother *Cheshyre* has said, that degrees in universities were first introduced to encourage learning and learned men; but then it is no consequence, that if learned men

men behave themselves in a manner that does not become them, they may not be suspended or deprived.

To consider therefore the several parts of the return, I shall first endeavour to contradict what *Bentley* said to the officer, that the process was illegal. It appears the vice-chancellor had jurisdiction of the cause; it is averred to be agreeable to the course of the court, which answers the two first objections, that it should have distinguished how the officer was to compel the appearance, and that being in debt it ought to have been a summons.

The objection that the time when he was to appear is not mentioned, would overthrow all inferior jurisdictions that hold courts at no certain time, but only summon one when they have business, in which case the party must take care to inform himself as well as he can. The distinction is, where the courts are held at a certain day, and where not. *Dy.* 262. 1 *Cro.* 214. 2 *Bulf.* 36. 2 *Cro.* 571. *Cro. Car.* 254. 1 *Roll. Abr.* 484. *pl.* 22, 35. *Show.* 95.

It is said that it does not appear at whose suit, nor for what occasion he was cited. But upon the whole return it does appear, *taliter processum fuit*, that Dr. *Middleton* came in and declared for 4 *l.* 6 *s.* shews it to be a proceeding upon what was done before in issuing the process.

My brother is pleased to say, the whole behaviour does not amount to a contempt, and that any man may insist the process is illegal, and that he is not convened before his proper judge: and certainly so he may, but then it ought to be in the course of a legal proceeding. If *Bentley* had so far complied as to have appeared before the vice-chancellor, and have insisted on these several matters; though there should perhaps have been no ground for the objection, yet it would have been unreasonable in the vice-chancellor to have taken it as a contempt. But when nothing of this nature is done, when there is no appearance at all, but a great deal of matter insisted on without doors, in order to arraign the jurisdiction of the vice-chancellor, and the manner of the proceeding; it is certainly a behaviour which no man who is summoned to appear before a court of justice can justify. Is it fitting any man should tell a beadle, that he will not obey the vice-chancellor, and that he has acted foolishly? Or is the vice-chancellor to sit and hear all this, without shewing he has a power to punish such a contempt?

But then it is objected, that though this be a contempt, yet the manner of the proceeding was not regular. In answer to

which I would obferve, that it is agreeable to the methods, both of the common and civil law courts, to punifh contemptuous words without calling in the party. If a man treats the procefs of this court with contempt, the way is to grant an abfolute attachment, without giving him an opportuity to ferve you fo a fecond time.

As to the evidence of the contempt, it is averred to be according to the courfe of that court. A depofition is a matter related upon oath: the civil law fays it may be done at the relation of the officer, that the court will fo far give credit to their own officer, as to punifh a contempt that he only relates to them.

The charge againft *Bentley* for taking the procefs, does amount to an actual taking away; it is *de manibus abftulit.*

The cafe of disfranchifement of corporators has been infifted on, but furely that does not come up to this. There the right of the officer is finally concluded, whereas here is only a fufpenfion till a fubmiffion: befides the members of acorporation have an intereft in one another, but *Bentley*'s cafe has no relation to any body elfe.

The method of the whole proceeding, both as to the fufpenfion, and what was done by the congregation, may be right, though it does not tally with the method of our common law proceedings. A *feme covert* may fue in the fpiritual court without her hufband, and in a motion for a prohibition cafes fhould be cited to prove the neceffity of the hufband's joining in a fuit, yet we fhould be told at laft, that it was the method of their proceedings below, and was well enough: does not our admiralty court enforce the fentence of a foreign court, without examining into their method of proceeding?

I would not have it gone away with as a notion, that the univerfity of *Cambridge* affect an uncontroulable jurifdiction. They only defire to enjoy their privileges in a manner confiftent with law and juftice: they infift that what they have done in this cafe is is fo, and therefore they hope there fhall be no peremptory *mandamus*.

C. J. This is a cafe of great confequence, not only as to the gentleman who is deprived, but likewife as it will affect all the members of the univerfity in general.

I think the return has fully juftified us in fending the *mandamus*, as it fhews the power of the vice-chancellor and the congregation is only to deprive for a reafonable caufe; and as it is not pretended there is any vifitor, or any other jurifdiction, to examine into the reafonablenefs of the deprivation, but that of this court.

It

It is the glory and happineſs of our excellent conſtitution, ɪat to prevent any injuſtice no man is to be concluded by the rſt judgment; but that if he apprehends himſelf to be aggriev-d, he has another court to which he can reſort for relief; for ɔis purpoſe the law furniſhes him with appeals, with writs of rror and falſe judgment: and leſt in this particular caſe the ·arty ſhould be remedileſs, it was become abſolutely neceſ-ary for this court to require the univerſity to lay the ſtate of heir proceedings before us; that if they have erred, the party nay have right done him, or if they have acted according to he rules of law, that their acts may be confirmed.

The univerſity ought not to think it any diminution of their onour, that their proceedings are examinable in a ſuperior ourt. I am ſure this court, which is ſuperior to the univer-ty, thinks it none; for my own part I can ſay, it is a con-leration of great comfort to me, that if I do err my judg-ent is not conclusive to the party, but my miſtake will be ctified, and ſo injuſtice not be done.

As to the proceeding againſt Dr. *Bentley*, it muſt be agreed at the vice-chancellor had conuſance of the cauſe, and ſo the .it was well inſtituted againſt him. I muſt likewiſe take the rocess to compel an appearance to be regular, being averred be according to the courſe of that court.

As to Dr. *Bentley*'s behaviour upon being ſerved with the pro-eſs, I muſt ſay it was very indecent, and I can tell him if he ad ſaid as much of our proceſs we would have laid him by he heels for it: he is not to arraign the juſtice of the proceed-ngs out of court before an officer, who has no power to exa-mine it.

When he ſaid the vice-chancellor *ſtulte egit*, it was what he ight have been bound over for to his good behaviour; but believe it is alſo eſtabliſhed, that ſuch a behaviour will not arrant a ſuſpenſion or deprivation.

He ſaid he would not obey, but *non conſtat* but he thought etter of it afterwards, and did appear.

I cannot think the evidence of this contempt was ſufficient: does not appear to have been upon oath, as it ſhould have een.

But be theſe matters how they will, yet ſurely he could ever be deprived without notice. I do not obſerve but it is total deprivation, and not temporary only, as was ſaid at .e bar.

As to the proceedings before the congregation, it does not appear they reheard the matter any otherwife than by the relation of the vice-chancellor. They fhould have adjudged all the facts again, and have averred, that the deprivation was for them; whereas *his de caufis* they deprived him, amounts to no more than that the vice-chancellor told them fo.

The vice-chancellor's authority ought to be fupported for the fake of keeping peace within the univerfity; but then he muft act according to law, which I do not think he has done in this cafe.

Powys J. *accord' in omnibus.*

Eyre J. The univerfity, unlefs they had a vifitor, are certainly accountable to this court. As to the deprivation, I am not fatisfied, that for a contempt to the vice-chancellor's court, the congregation which is another court can deprive; for it is not a contempt to the univerfity in general, and it is not faid in the return, that for contempts to the vice-chancellor the congregation can deprive. Every court has a power to punifh contempts to itfelf, but I never till now heard of one court's refenting a contempt to another.

But furely for a contempt they cannot deprive. We punifh our officers, but we do not turn them out. Or if they could deprive, it can never be done without notice.

Though the vice-chancellor had jurifdiction in this matter, yet in virtue of our fuperintendency over all inferior jurifdictions, we muft take care he does not abufe his authority. Do not we prohibit the fpiritual court, till they give a copy of the libel, in all cafes within their jurifdiction?

Fortefcue J. If they had returned a vifitor, it would be fomething, but without that they muft fubmit to the jurifdiction of this court, which is no more than exempt jurifdictions, as the county palatine which has *jura regalia*, do.

A deprivation can never be the proper punifhment for a contempt, becaufe it cannot hold in the cafe of under graduates. I think the behaviour of Dr. *Bentley* was a contempt, for which he might be bound to his good behaviour, as it was out of court.

There is another thing confiderable in this cafe, whether upon any account the univerfity can deprive a man of his degrees; becaufe he is in from the crown, whence the power originally flows.

Befides,

Besides, the objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon *Adam*, before he was called upon to make his defence, *Adam* (says God) where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldest not eat? And the same question was put to *Eve* also. *Per cur'*, *ulterius concilium*. Sess. Cas. 219. pl. 179.

Hil. 10 *Geo.* it was argued a second time by Mr. *Reeve* for the writ, and Mr. Attorney General *e contra*. And without entering much into the debate of the other matters, the court held the whole proceeding to be illegal for want of a summons, and so granted a peremptory *mandamus*.

Between the Parishes of Foston *and* Carlton.

After an order of removal is quashed, the party cannot be removed a second time without stating a new settlement.

TWO justices send a poor person from *Foston* to *Carlton*. On appeal the order is quashed, and at three months and two justices, without shewing any new settlement since the last order, make a new order to remove him from *F.* to *C.* a second time. *Et per curiam*, The last order must be quashed. The case of *Barrow* v. *Ingoldsby*, *Pas.* 11 *Ann.* was at the distance of nine months, but the court quashed it, because there could be no inconvenience in putting them to shew a new settlement.

Dominus Rex *versus* Unitt.

Ejectment is a process of the court. Salk. 260.

THE court declared that a declaration in ejectment was so far a process of the court, that they would punish contemptuous words on the delivery of it, as a contempt of this court.

Dominus Rex *versus* Burchett.

Contempt. 8 Mod. 208. 9 An. c. 14.

THE court ordered an attachment *nisi* against the town clerk of *Guildford*, and a defendant convicted on the same act, for granting and suing out a replevin of goods distrained for the penalty. But on shewing cause the next term, when *Eyre* J. only was present, he discharged the rule, because it was only a contempt to the inferior jurisdiction of the justices, and in that case *B. R.* never interposes.

Dale *versus* Johnson.

At nisi prius *in* Middlesex, coram Pratt *C. J.*

Evidence.

THE defendant in the action assigned for error, that the plaintiff died before judgment: and to prove it he called the wife of the plaintiff, and the Chief Justice allowed her to be a witness. *Quare tamen*, for that is begging the question, which was then to be tried.

Mountcan *versus* Wilson. Ibid.

Coram Eyre *and* Fortescue *Justices*.

All acts done by commissioners must be signed during their sitting. Dav. Rep 47, 48.

A Certificate from the commissioners for stating the debts of the army was offered in evidence, but rejected, because it appeared to be signed by one at a time at their houses, the Judges being of opinion that it could only be signed sitting upon the commission, like the dean and chapter of *Fernes*'s case of *capitulariter congregati*.

Rushdell *versus* Carnesse. In Canc.

Where there is a legacy to the executor for his trouble, the surplus shall be distributed. 9 Mod. 9. 2 P. Will. 158. See P. Will. 7.

JUSTICE *Powys* (who sat for Lord Chancellor) delivered a special resolution on this case.

A woman makes her will, and amongst several small legacies she says, And to *A. B.* my executor 5*l.* for his care in fulfilling my will.

1 Vern. 473. 2 Vern. 673, 675, 736.

This has long been a litigated question, whether the executor should have the surplus, where there is a specifick legacy to him. The case of *Forster* v. *Monk* before Lord *Jefferies* was soon after the statute of distributions, and he held that the surplus should be distributed. The three commissioners of the great seal afterwards reversed this decree, but upon appeal to the House of Lords the reversal was reversed, and the decree for a distribution set up again.

2 P. Will. 114.

The next was the Duchess of *Beaufort*'s case, where the use of the plate was given her for life, and Lord *Cowper* decreed a distribution; but the Lords reversed it, because it was only a possession of it that was given her, and no property.

Then

Then came the case of *Littlebury* v. *Buckley*, which was in the equity court of *London* before Sir *Peter King* the Recorder, who decreed a distribution where the devise to the executor was of all his effects beyond sea. But there being in that case a strong evidence of a contrary intent, the Lords allowed themselves a latitude of examining such proof, and thereupon reversed that decree. 2 Vern. 677.

The last case I shall mention was that of *May* v. *Lewen* in this court in *February* 1720, before the present Chancellor, where there was a devise to two executors of 50*l.* a-piece for their trouble and pains; and a distribution was decreed. 2 P. Wil. 162.

This case is the very same with the case at bar. The giving a legacy for his care, shews plainly the testator intended him only as a trustee, and therefore I found myself upon those words, in decreeing a distribution in this case.

N. B. This being *vexata quaestio*, in 1725, *King*, then Lord Chancellor, brought a bill into the House of Peers (which passed that House) to settle the point; but upon sending it down to the Commons it was thrown out upon the first reading; a bill sent up by the commons to prevent bribery and corruption in elections having been refused to pass in the House of Lords. The bill was to have settled it for the benefit of the executor.

Lock *versus* Wright.

Hil. 7 Geo. rot. 353.

THE plaintiff declares, that the defendant by his writing indented agreed with the plaintiff, that he (the defendant) would accept of the plaintiff 500*l.* fourth subscription so soon as the receipts should be delivered out by the company, and would pay for the same 950*l.* on the 5th of *November* next after the date of the writing. Then he avers, that the defendant did not pay the money at the day.

7 G. St. 2. c. 1. Where there are mutual remedies, either may sue without shewing a performance on his part. Difference between an indenture and deed-poll. 8 Mod. 40.

The defendant demurs generally, and Mr. *Lingard pro defendante* objected, that the plaintiff had not shewn the delivery of any receipts, or an impossibility of doing it, and cited 1 *Lutw.* 245. *Salk.* 171.

Probyn contra anſwered, That there were mutual remedies, and therefore it need not be ſhewn. 1 *Saund.* 319. 1 *Lev.* 274.

Eyre Juſtice doubted whether here was a mutual remedy, for the plaintiff does not covenant to deliver, but the other only to accept; to which *Forteſcue* Juſtice inclined. *Sed per Pratt* Chief Juſtice, The time for payment of the money is certain at all events; but as for the delivery of the receipts, that was left incertain, becauſe it was impoſſible to fix a time for that; and if the defendant has made a fooliſh bargain in undertaking to pay the money on the 6th of *November*, whether he had the receipts or not, we cannot help him. The nature of theſe contracts is for the other party to give a deed obliging himſelf to deliver the ſtock; but even upon this agreement I ſhould think the defendant would have his remedy. In the caſe of a deed poll, if the leſſee enters and enjoys the land, the other ſhall maintain debt for rent, and yet the whole is the words of the leſſor.

Paſch. 8 *Geo.* it was argued a ſecond time by *Weſt pro defendente.* It will not be diſputed but that generally ſpeaking the word *pro* will create a condition precedent. 1 *Vent.* 147. 2 *Mod.* 33. 1 *Lev.* 87. *Salk.* 112. And that it will do ſo in this caſe, if I can clear it from two objections that have been made. 1. That here is a mutual remedy; and, 2. That here is a particular day fixed for the payment of money.

As to the firſt; That is begging the queſtion, for I take it there is not a mutual remedy, the words being the words of the defendant only, "That he will accept the ſubſcription, and pay "for the ſame:" which lays the plaintiff under no obligation to deliver the receipts. 1 *Saund.* 320.

2. As to the ſecond objection, that there is a particular day appointed for payment of the money; I do admit, that if it appeared upon the contract, that ſuch a day muſt of neceſſity happen before the receipts could be delivered, it would then be very difficult to anſwer it; but that is not this caſe, for the company might if they pleaſed have given out the receipts; and that brings the caſe within the diſtinction laid down by Lord Chief Juſtice *Holt* in the caſe of *Thorpe* v. *Thorpe*, *Salk.* 171. Beſides, it is obſervable, that this is an entire covenant, to accept and pay, ſo that he is not to pay till he can accept. *Lutw.* 490.

Reeve

Reeve contra. I admit the firſt part of Mr, *Weſt*'s argument, but inſiſt on the two objections he has taken notice of, as ſufficient to bring this caſe out of the reach of that general doctrine.

Here is a certain ſum to be paid at a certain day, and that too before the other part of the contract could poſſibly be performed. The court will take notice of the *South-ſea* acts, and by that of 7 *Geo. ſt.* 2. it appears the receipts could not be delivered by the 6th of *November*; ſo that this caſe falls within the firſt diſtinction of *Thorpe* v. *Thorpe*, that if a day be appointed for payment of the money, and that day is to happen before the thing can be performed, an action may be brought for the money, before the thing be done; becauſe it appears the party relied upon his remedy.

But then ſay they, here is no mutual remedy. But I take it, that this being an agreement by indenture, the court will intend it was executed by both parties. As to the caſes they are all of parol agreements, where a conſideration muſt appear to make it a binding promiſe; but here the action will be maintainable on the bare covenant to pay, without any conſideration at all, and therefore the *pro*, *&c.* may be left out.

Adjournatur. And this term *Pratt* Chief Juſtice delivered the reſolution of the court.

This is an action upon a deed poll made by the defendant, and whereby he covenants to accept ſo much ſtock, and to pay for the ſame, and the plaintiff in an action for the money has not averred a delivery or tender of the ſtock, and for this fault we are all of opinion, the declaration is not good.

The intent of the parties appears to be, that one ſhould have the money, and the other the ſtock; and not that either ſhould perform his part of the agreement, and lay himſelf at the mercy of the other for the equivalent. This is not a covenant entered into by both parties, upon which each will have his mutual remedy; but it is the deed poll of the defendant only; and therefore though upon delivery or tender of the ſtock the plaintiff will have his remedy for the money, yet the defendant on the other ſide upon payment of the money will have no remedy to compel the delivery of the ſtock; and having no ſuch remedy he ſhall not be obliged to pay the money, till the conſideration for which it is payable is performed.

The word *pro* will be either a condition precedent or ſubſequent, as will beſt anſwer the intent of the parties: in this caſe it

it must be a condition precedent, because otherwise the intention of the defendant to have the stock for his money can never take effect, and this is proved by 7 *Co.* 10. and 1 *Inst.* 204. where the annuity *pro una acra*, says the book, supposes the acre to be first granted.

The case of *Callonel* v. *Brigs*, (*Salk.* 112.) was not so strong, for there was a promise to transfer, which gave a mutual remedy; but yet *Holt* Chief Justice held the plaintiff to shew a tender, because that was the consideration for the defendant's payment of the money. And the case he there puts of the sale of a horse for 10 *l.* is exactly the same with this.

The resolutions that were mentioned at the bar of the case of *Thorpe* v. *Thorpe*, are all founded on great reason, and the first of them is agreeable to the resolution of this case, which is an executory contract, where one is to do the act, and for the doing thereof the other is to pay.

And this difference between a mutual covenant and a deed poll is likewise taken and allowed in the case of *Pordage* v. *Cole*, 1 *Saund.* 320. where the court were of opinion the defendant had his remedy, "otherwise (says the book) it would have "been, if the deed had been the words of the defendant only," which is this case.

For these reasons we are all of opinion the defendant must have judgment.

Michaelmas

Michaelmas Term

10 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Justice.*

Sir Littleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Justices.*
Sir John Fortescue Aland, *Knt.*

Sir Robert Raymond, *Knt. Attorney General.*

Sir Philip Yorke, *Knt. Solicitor General.*

Paine *versus* Masters.

Pleading the delivery of any thing in satisfaction is not sufficient without shewing an acceptance.

ACTION *sur le case* upon a promissory note, the defendant pleads the delivery of twenty hogsheads of claret in satisfaction, and which *ipse praed'* the defendant (instead of the plaintiff) received in satisfaction. On a general demurrer *Strange pro quer'* objected, that the averring the delivery of the wine to the plaintiff was not sufficient without shewing his acceptance of it, which was wanting in this case by the defendant's name being put instead of the plaintiff's. And cited *Salk.* 629. and the case of *Hawkshaw* v. *Rawlings in B. R. Hil.* 3 *Geo.* in both which the court held, that the bare pleading he gave the thing in satisfaction, without shewing that the plaintiff received and accepted it, as such, would be insufficient. *Et per curiam*, Judgment for the plaintiff. *Ante*, 23.

Robinson

Robinson *versus* Green.

Non assumpsit a good plea to an action against a carrier.

THE plaintiff declares against a carrier upon the custom of the realm, and sets forth, *quod ipse* (the plaintiff) *requirebat* the defendant *ad carriand' bona praed'* from the parish of *St. Sepulchre's* to *Uttoxeter*, *dictusque* the defendant *adtunc et ibidem bona praed' ad carriand' recepit*, and afterwards lost them.

The defendant pleaded *non assumpsit*, and after verdict for the plaintiff it was moved in arrest of judgment, that this action is founded upon the tort in not delivering the goods, and therefore the proper plea would have been Not guilty.

E contra it was insisted, that though it is a tort, yet it arises from an agreement, and any general issue will be good, that will bring the merits of the cause in question. As Not guilty in *assumpsit*. *Cro. El.* 470. 1 *Lev.* 142. Sir *T. Jones* 184. And it will certainly be aided after a verdict. 1 *Sid.* 340. 1 *Saund.* 103. Sir *W. Jones* 140. *Cro. Car.* 78.

Et per curiam, It is well enough, the undertaking to carry is the *gist* of the action, and as in *assumpsit* you may plead Not guilty, as was done in the case of *Cogs* v. *Bernard*. *Salk.* 26. as appears by the record at the end of the book, *page* 733. So in the case of a tort founded on an agreement *non assumpsit* will be sufficient, because it tries the merits, as much as Not guilty could have done. The plaintiff had judgment.

Davies *versus* Hoyle.

Where a *nolle prosequi* is entered, the plaintiff need not be amerced.

ON error *e C. B.* in an action upon the case on several promises, there is judgment on demurrer as to one count, whereupon the plaintiff enters a *nolle prosequi* as to the rest, and the defendant is put without day.

It was objected, that this is a confession, that the plaintiff had no cause of action as to those counts, and therefore he should be amerced *pro falso clamore*. But *Eyre* J. (*solus*) thought it agreeable to all the entries, and so the judgment was affirmed.

Ball *versus* Bostock. At Guildhall.

trover for three *South-sea* bonds the case was this: *Ball* livered to *Lechmere* a broker these bonds to sell, and they picked out of his pocket. Notice being given at the -*sea* house, they were stopt by Mr. *Henry* one of the s, upon *Bostock*'s bringing them to receive the interest. this *Bostock* brought trover against *Henry*, who at the offered to prove the property to be in *Ball*, and called *mere* for that purpose. But it appearing he had given bond lemnify the company in stopping the bonds, *King* C. J. d to let him be examined, saying that though there are instances where a party shall be a witness, though he is erned in the event of the cause; yet there never was a of allowing one who had made himself liable to pay costs e action; upon this the plaintiff recovered. Then *Ball* s trover against *Bostock*, and at this trial exception was 1 to *Lechmere*'s evidence, because if *Ball* should recover ist *Bostock*, that would be set in equity against the former very by *Bostock* against *Henry*, and so discharge *Lechmere*'s ; but the Chief Justice said, that was too remote to ex- e him from being a witness, and went only to his credit. ereupon he was sworn, and proved the property in *Ball*, that they were stolen. On the other hand the defendant ed that he bought them at a tavern of a clergyman, and 300*l.* in money besides the interest: the Chief Justice t to the jury upon the validity of the sale, and they found he defendant.

Where a person may be interested and yet shall be a witness.

Douglass *versus* ———

PON an affidavit that they had tendered a declaration in ejectment, and that the servants refused to call their er, or receive it, saying they had orders to take no papers, *rg* moved, that leaving it at the house might be sufficient, h was ordered accordingly.

Practice. Cited in Cas. temp. Hardw. 164.

Taylor *versus* Lake.

was moved to set aside a verdict, because the *distringas*, when it was at *nisi prius*, was not stamped: but the plain- now producing it stamped, the court would do nothing in since the penalty must have been paid, and then it is as d as if stamped at first. 9 & 10 *W.* 3. *c.* 25. § 59.

Stamp duties. 9 & 10 W. 3. c. 25. s. 59. 8 Mod. 226.

Tarrant

Tarrant *verfus* Mawr. In C. B.

Hufband cannot ftop the wife's proceedings in fpiritual court for defamation.

THE wife libelled in the fpiritual court for calling her whore, and there being proceedings likewife for defamation againft her by the other, the two hufbands enter into an agreement to ftay proceedings on both fides; and upon one of the wives going on, the hufband moved for a prohibition; but denied, for *per curiam*, the fuit is by the wife, to recover her fame, and it is not in the power of the hufband to reftrain her. 1 *Roll. Rep*. 426.

Johnfon *verfus* Lancafter.

Tender pleadable to a *quantum meruit*. R. Raym. 255.

IT was fettled on demurrer, that a tender is pleadable to a *quantum meruit*, and faid to have been fo held before in *B. R.* 10 *W.* 3. *Giles* v. *Hart*, *Salk*. 622.

Palmer *verfus* Epifcopum Exon.

No ornaments can be fet up in the church without confent of the ordinary.

SIR *Thomas Bury* fet up his arms in the church of *St. David*'s in *Exon*: the ordinary promotes a fuit in the fpiritual court, to deface them, as being fet up without his confent. Mr. *Cruwys* moved for a prohibition on the authorities that action lies by the heir for defacing the monument of his anceftor; but *Eyre* and *Fortefcue* Juftices faid, the ordinary was judge what ornaments were proper, and might order them to be defaced.

Serjeant *Glyde* moved it in *C. B.* and it was denied there alfo.

Richardfon *verfus* Atkinfon.

At nifi prius *in* Middlefex, coram Eyre et Fortefcue (abfente *C. J.*)

Taking part and fpoiling the reft is a converfion of the whole.

THEY held that the drawing out part of a veffel, and filling it up with water, was a converfion of all the liquor, and the jury gave damages as to the whole.

Beck

Beck *versus* Nichols. In C. B.

TRESPASS of assault, battery, wounding and imprison- ment, and also for breaking and entering his house, and opening the doors of the said house, and breaking the locks and three bars belonging to the said doors; the defendant pleaded Not guilty to all except the imprisonment, which he justifies; on trial the justification was found for the defendant, and the Not guilty for the plaintiff. Damages 2*s.* 6*d.* And held by the court that the damages being under 40*s.* he could not have full costs for the battery, because the Judge had not certified the battery to be proved, neither could he have full costs for breaking the house, &c. because this was a trespass relating to the freehold, the construction of the 22 & 23 *Car.* 2. c. 9. § 136. having been, that it extends to trespasses relating to the freehold and inheritance, and to such trespasses only; which is collected from the exception where the Judge certifies that the title came in question, which shews that the act extends only to such trespasses, where the freehold might come in question, and not to trespasses of chattels.

Where no more costs than damages. Gilb. Eq. Rep. 197. 4 Bac. Abr. 515.

Hilary Term,

10 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Juſtice.*
Sir Littleton Powys, *Knt.*
Sir John Forteſcue Aland, *Knt.* } *Juſtices.*
Sir Robert Raymond, *Knt.*
Sir Philip Yorke, *Knt. Attorney General.*
Sir Clement Wearg, *Knt. Solicitor General.*

Dominus Rex *verſus* Major' de Kingſton ſuper Hull.

Cannot join diſtinct rights in one *mandamus*. 8 Mod. 209, Salk. 433, 436.

A Motion was made for a *mandamus* to the mayor, to aſſemble and do the buſineſs of the corporation, and the writ was granted accordingly. In drawing up the writ they made it out for an aſſembly, and to admit all perſons having a right to their freedom, who ſhould appear before them and demand it. Serjeant *Pengelly* moved to ſuperſede it, becauſe every perſon's was a diſtinct right, and it would be hard to oblige the mayor to make a return that he had admitted all who had a right. *Et per curiam*, It muſt be ſuperſeded, for we never intended ſuch a complicated *mandamus* as this.

Dominus

Dominus Rex versus Inhabitantes de Cirencester.

T was stated, that an apprentice was bound in the parish of *A.* and lived there off and on for three quarters of a year. ception was taken, that this was no settlement, since he ght not inhabit forty days together. *Sed per curiam*, That is t necessary, and the order for making it a settlement was ifirmed.

The forty days inhabitation of an apprentice need not to be all together. Sett. Cas. 279. pl. 219.

Dominus Rex versus Johnson.

A Female child of nine years old was brought up by *habeas corpus* in the custody of her * nurse. And it was moved it she might be discharged, if she was under any restraint; iich was agreed to: but it appeared she was not. Then it is moved, upon producing her father's will devising the custody of her to an uncle, that she might be delivered up to him her guardian. The court at first doubted whether they ould go any further than to see she was under no illegal restraint, and took time till the next day to look into Mrs. *Turville*'s case, *ante*, 444. And then declaring, that this being case of a young child, who had no judgment of her own, ey ought to deliver her to her guardian, who took possession her in court.

Child brought up by *habeas corpus* delivered to guardian. 2 L. Raym. 1334. 8 Mod. 214.

* Near relation and *guardian*, appointed by the spiritual court but see 2 Stra. 982, *contra*.

Bullock versus Noke.

At Guildhall, coram Pratt *C. J.*

7 G. st. 2. c. 1.

N a stock cause the plaintiff proved a tender on the second day of the opening, and would have examined into the custom of the alley, which was to allow either party a day or two tender or accept; but the Chief Justice refused to hear us, ing their usage could never alter the law, and so the plaintiff was called. *N. B.* In *C. B.* Chief Justice *King* left it to jury upon such an evidence, and they found it a good ider.

Tender of stock must be on the very day.

Between the Pariſhes of St. Giles in Reading *and* Everſley Blackwater in Berks.

Q. Where children born at the reſidence of the father for four years, in a place where he was not ſettled, are ſettled after his death.
2 R. Raym. 1332.
Foley 396.
Caſ. of Set. and Rem. 112. pl. 149.
See Andr. 350.
Seſſ. Caſ. 85. pl. 80. ib. 111. pl. 105.
2 Seſſ. Ca. 116. pl. 112.
Forteſ. Rep. 320.
8 Mod. 169.

UPON a ſpecial order it was ſtated, that *William Cheſterman* was born in *St. Giles*'s, and put apprentice in *Everſley Blackwater*, where he ſerved two years, till the maſter failed; that then he returned to *St. Giles*'s, where he lived four years, married a wife, by whom he had there two children, and died; and that during the laſt four years he never lived in *Everſley Blackwater*.

Upon this order the queſtion was, where the wife and children were ſettled. As to the wife, all agreed her to follow the laſt ſettlement of her huſband; which was in *Everſley Blackwater*. But as to the children, the court were divided; the Chief Juſtice and *Powys* J. inclining, that they having never been removed during the life of the father, they were ſettled in *St. Giles*'s, the place of their birth. But *Eyre* and *Forteſcue* Juſtices, thought the ſettlement to be in *Everſley Blackwater*; and that ſince during the life of the father they might have been ſent thither, his death would not vary the caſe.

Children born where the father is not ſettled may be ſent to his ſettlement after his death.

Adjournatur. And this term it was debated again, and the Chief Juſtice changed his opinion; holding, now, that the ſettlement of the children was in *Everſley Blackwater*; and that the death of the father would not hinder their being ſent thither. *Powys* J. likewiſe came over. So that there were three of that opinion, againſt *Raymond* J. who thought that this caſe muſt often have happened, if children could be thus ſent after the death of the father. They ſaid the caſe of ſettling baſtards and vagrants at the place of their birth was *ex neceſſitate*: but here was none.

The order for ſending the children to *Everſley Blackwater* was confirmed.

Eaſter

Easter Term

10 Georgii Regis. In B. R.

Sir John Pratt, *Knt.* *Lord Chief Justice.*

Sir Littleton Powys, *Knt.*
Sir John Fortescue Aland, *Knt.* } *Justices.*
Sir Robert Raymond, *Knt.*

Sir Philip Yorke, *Knt.* *Attorney General.*

Sir Clement Wearg, *Knt.* *Solicitor General.*

Knight *versus* Cambridge.

Idem *versus* Dodd.

Hil. 9 Geo. rot. 375.

ACTION *sur le case* upon a policy of insurance, whereby the insurer undertakes against the *Barratry* of the master and mariners; and assigns the breach in a loss *r fraudem et negligentiam* of the master. Judgment *pro quer'* in *B.* and the general errors assigned. *Barratry* in a policy, the signification thereof. L. Raym. 1349. 8 Mod. 230.

It was objected in this court, that the *fraud* and *negligence* of e master was not within the policy, being more general than e word *barratry*. *Et per curiam*, The negligence certainly not, but the fraud is. *Barratry* is of a general signification, d not confined barely to the running away with the ship. It mes from *barat*, which signifies *fraus* and *dolus*, and extends any fraud of the master. The end of insuring is to be safe Dufresne Gloss. Dict. de Furetier.

in all events, and it would be very prejudicial, if we were to be making loop-holes to get out of theſe policies. The inſurer knows the maſter, and whether he can truſt him; and he that inſures againſt his running away with the ſhip, never imagined he might or would be guilty of any other fraud. Judgment affirmed.

Between the Pariſhes of Puckington *and* Chepton Beenchamp in com' Somerſet.

The bankruptcy of the maſter does not diſſolve the apprenticeſhip.
L. Raym. 1352.
Seſſ. Caſ. 278. pl. 218.
Forteſc. Rep. 321.
8 Mod. 235.
Caſ. of Set. and Rem. 117. pl. 155.
Foley 229.

UPON a ſpecial order the caſe was ſtated, that *A.* was bound an apprentice, and ſerved and inhabited two years, till a commiſſion of bankruptcy was taken out againſt the maſter, at which time the apprentice without having the indenture delivered up, or any diſcharge at the ſeſſions, hires himſelf as a common ſervant into another pariſh, and ſerved a year. The ſeſſions adjudge this to be no diſſolution of the apprenticeſhip, and conſequently, that the ſettlement of the apprentice was in the firſt pariſh where he was bound.

Et per curiam, Their judgment is right. There could be no diſſolution of the contract, unleſs the indenture had been delivered up, or the ſeſſions had diſcharged him; as no doubt they would have done, if they had been applied to. And then as the firſt contract had continuance, the apprentice had no power to hire himſelf; and the ſervice afterwards for a year was void, as to any pretence of giving him a ſettlement. That ſervice muſt be taken as a ſervice to the firſt maſter, who by law was intitled to the wages, and therefore the order muſt be confirmed.

Caſe of the Mayor of Penryn.

There muſt be judgment of ouſter where the party is found duly elected but not ſworn.

This judgment was affirmed in Parliament.

ON an information *in natura de quo warranto*, to ſhew by what authority he exerciſed the office of mayor, there were two iſſues, the firſt as to his election, which was found with the defendant; and the ſecond as to the ſwearing, which was found againſt him. Upon return of the *poſtea*, it was moved, that judgment of *ouſter* ſhould not be againſt him, ſeeing he was duly elected, but that he ſhould rather have a *mandamus* to ſwear him in. *Sed per curiam*, The acting without being ſworn is certainly an uſurpation, and that being found, we muſt pronounce judgment againſt him upon this record. If he be not too late, he may have a *mandamus* to ſwear him in, but we muſt puniſh him for his uſurpation hitherto. Judgment *pro Rege*. 9 *Ann.* c. 20.

Ruſſel

Ruffel *verfus* Martin.

Idem *verfus* Thorpe.

.ebt upon a bail bond the *memorandum* was of *Trinity* n, and I excepted, that the affignment appeared to be *ember* following. Then the plaintiff moved to amend, objected, there was nothing to amend by. *Et per cu-* We cannot amend it, as it now ftands; but we will ive to file a new bill of *Michaelmas* term, with a fpecial *ndum*; which the plaintiff afterwards did, and then d of courfe upon payment of cofts.

The court wi give leave to f a new bill to amend by.

Dominus Rex *verfus* Gunfton.

JEANT *Darnall* moved for a *certiorari* to the *Old iley*, to remove an indictment againft a perfon of cre- falfly pretending that a perfon of no reputation was *n Thornycraft*, *per quod* the profecutor was induced to n. *Sed per curiam*, As you move on behalf of the nt, we muft have a more particular reafon; *ideo nil per motionem*.

No *certiorari* *Old Bailey* witl out fpecial caufe. Comb. 319. 2 Stra. 717. Barnard. K. B 5. Seff. Caf. 314 pl. 245. 315. pl. 246. 321. pl. 254.

Stevenfon *verfus* Nevinfon.

On a trial at bar in B. R.

E queftion was, whether the plaintiff was qualified to e elected common council-man of *Apulby*. The de- attempted to difqualify him, by fetting up two quali- ; which he had not, *viz.* a burgage tenure, and being itant; and to prove this called one who was an in- , but had not a burgage tenure. It was objected, that no witnefs to narrow the right, and confine it to bur- iants and inhabitants, having one of the qualifications and therefore fo far interefted, as he was nearer the fet up than other perfons; but the court faid there ecessity of allowing fuch people in a queftion of this fince they muft beft know the right; befides he was in witnefs againft himfelf, by faying, though I am an in- , yet I have no right to be chofen, becaufe I have not ge tenure.

Where there a two qualificati ons to an elect on of an office he who has bu one only may l a witnefs as tc the right. Ld. Raym. 1353.

Anonymous.

On a trial at bar in C. B.

Where the power is only to revoke, no new uſes can be declared.

A. Suffers a recovery to the uſe of himſelf for life, remainder to *B.* in tail, remainder to *C.* in tail, remainder to *D.* in tail, remainder to *A.* in fee, with power to revoke the three remainders in tail by any writing under his hand and ſeal. He revokes them within the terms of the power, and by the ſame deed declares new uſes in favour of the plaintiff, without any words of conveyance, covenant to ſtand ſeiſed, or conſideration expreſſed: and upon this the queſtion was, whether this new declaration of uſes was good or not.

It was inſiſted on *pro quer'*, That *A.* having revoked the intermediate remainders, had the whole fee in himſelf, and might diſpoſe of it as he pleaſed; and whether it was by the ſame deed or by a different deed was not material.

But it was anſwered and reſolved by the court, That true it was he might by will or any new conveyance have made ſuch new diſpoſition, and even the ſame deed would have been ſufficient for that purpoſe, if there had been a new grant, or a new covenant on conſideration expreſſed; but here he had declared new uſes as under the recovery, whereas the uſes of the recovery were full before, and the power was only to revoke, and not to limit new uſes. *Ex relatione aliorum.* The plaintiff was nonſuit.

Sir Chriſtopher Muſgrave *verſus* Nevinſon.

New trial granted after a trial at bar.
L. Raym. 1358. cited in Andrews 317.

THE corporation were all invited to a treat, when one of the aldermen deſired leave to reſign, upon which his reſignation was taken, and the plaintiff at the ſame time choſen and ſworn in. Upon a trial at bar the jury found it a good election; and the court granted a new trial, it being fraudulent, and it appearing one of the members was not there till after the election, and there was no ſummons to meet to do ſuch a corporate act, that the members might come prepared. The meeting likewiſe was not in the *Mootball* but at a tavern, and it was a plain ſurprize, and even all not preſent.

As to the point of its being a trial at bar the court made no difficulty of that, ſince the caſe of *Bewdley*, and another of

Sir

: *Joseph Tyley* v. *Roberts* in *C. B.* where on a trial at bar whe-er *compos* or *non compos* the jury found against the weight of e evidence, and there was a new trial. The case in *Stiles* which is the first new trial in print) was after a trial at bar; d in the case of an alderman of *Derby* he was afterwards ousted on a *quo warranto*.

Et per Raymond Justice. My Lord Chief Justice *Holt* used to y, he was of opinion that the practice of granting new trials as much ancienter than the case in *Stiles*; since we meet ith challenges that the party was sworn on the former trial, id therefore ought not to be a juror again.

N. B. As to another of the corporators of *Apulby*, he was put) prove the receiving the sacrament within a year before his lection, it being recent, and therefore the court required it, iough no notice was given him for that purpose.

A corporator on a recent prosecution must prove receiving the sacrament within a year.

Wilkinson *versus* Myer.

Ld. Raym. 1350.

[N an action of covenant on a *South-sea* contract the de-fendant pleaded, that the contract was never duly registred :cording to the late act of Parliament; and upon the trial f that issue a case was made for the opinion of the court.

7 G. st. 2. c. 1. What is a good registry of a *South-sea* contract. 8 Mod. 173, 232. 2 R. Raym. 1352.

That the contract was by indenture (set out *in haec verba*) hereby the plaintiff, in consideration of 1436 *l.* 10 *s.* to be paid ' the defendant, doth covenant to transfer to him all such ock, bonds and money, as the *South-sea* company shall allow 1 the account of 1277 *l.* 1 *s.* 6 *d.* lottery annuities then lately bscribed into the stock by and in the name of the plaintiff: consideration of which the defendant covenants to accept e produce of such annuities, and to pay for the same 1436 *l.*) *s.* at the same time: that this contract was entered in the ooks of the *South-sea* company *in haec verba*, under which the aintiff subscribed these words, *This is for my proper use and nefit*; and then signed his name *Philip Wilkinson*.

That no evidence was offered that the contract was made : the use and benefit of any person besides the plaintiff, nor at the contract was made for the use and benefit of the aintiff only.

And a verdict was given for the plaintiff, subject to the inion of the court upon this case.

Strange

Strange pro quer[*]. The queftion is, whether this contract be duly regiftred, according to the direction of the late act of Parliament. I fhall offer my reafons in fupport of this regiftry; and fince this is like to be a leading cafe, and that many thoufands of contracts are to ftand or fall by the event of this queftion, I fhall ftate the claufe at large, becaufe I apprehend it will be material.

The act of Parliament upon which this queftion arifes is the only act that paffed in a feffion held for that purpofe at the latter end of the feventh year of his Majefty's reign; and after fome other provifions for reftoring the publick credit, which then greatly fuffered by the mifmanagement of the *South-fea* directors, it comes to the cafe of contracts between private perfons, and takes notice of the neceffity there was, to make fome regulations or orders touching contracts for the fale or purchafe of fubfcription or ftock, for preventing a multiplicity of vexatious and doubtful fuits in law or equity concerning the fame, and therefore it enacts, "That every contract for the "fale or purchafe of fubfcriptions or ftock, which fhall be "unperformed and not compounded before fuch a time, or an "abftract or memorial thereof, figned by the party interefted "therein, and who fhall be minded to take advantage of the "fame, fhall be entered and regiftred in books, which the re"fpective companies are required to prepare for that purpofe: "and in default of fuch entry or regifter every fuch contract, "as to fo much as fhall remain unperformed or not com"pounded, fhall be void." And then it follows, "That fuch "entries fhall exprefs the names of the parties or perfons "for whofe ufe or benefit fuch contracts were made."

Having ftated the claufe, I fhall confider what was the intention of this act of Parliament, and whether our regiftry has fulfilled that intention. The intention of the legiflature is expreffed in that part of the claufe which is introductive to the enacting part; it was to prevent a multiplicity of vexatious and doubtful fuits in law or equity, by giving the buyer of ftock a view, as well of him who has the legal remedy, as he who has the equitable intereft, thereby to eafe him of the trouble and expence of a fuit in equity againft the vifible contractor, to difcover whether the fale was not fecretly in truft for another, againft whom perhaps the buyer might have an equitable bar; and therefore if it is difclofed in the regiftry, not only where the legal remedy lies, but alfo who has the equitable intereft, there is an end of any trouble from vexatious and doubtful fuits in law or equity about that matter, which was all that was propofed or defigned by the legiflature.

In

In the caſe at bar, the contract is regiſtred *in hæc verba*, and that it appears the now plaintiff has a legal remedy(ſuch an one he has purſued) by action of covenant againſt the defendant. t ſay they on the other ſide, that is not enough, he may ly be nominal in this affair. In anſwer to that, he has added ſe words that are ſtated in the caſe, *This is for my proper uſe l benefit, Philip Wilkinſon.* So that he has anſwered the intent the act in both reſpects; he has regiſtred the deed, which gives n the title at law, and he has likewiſe ſhewn the equitable in- eſt to be in himſelf.

To this it is objected, that by the words of the act he is re- ired to expreſs for whoſe uſe or benefit the contract *was made*; d that in the preſent caſe, it is only expreſſed for whoſe benefit : contract was at the time of regiſtring.

I would ſubmit two things as an anſwer to that objection. That this is a forced conſtruction, and carries the words *re made* farther than is neceſſary to anſwer the deſign of the :. And, 2. That if your Lordſhip ſhould be of opinion to ıſtrue it ſo nicely, yet our regiſtry will be ſufficient.

1. To ſhew this to be a forced conſtruction, and what there is occaſion to make, in order to attain the end of the legiſlature, ꝛould beg leave to ſay, that conſidering, this act is made to train men in ſome degree from the full exerciſe of a legal re- dy they had before; it is to be conſtrued in ſuch a manner, will deprive the ſubject of as little as may be, and it is not to extended to any conſtruction beyond what will ſtrictly anſwer : view of the Parliament; and ſo the court did often intimate ɔn ſeveral motions that have been in this court relating to bail ɔn this act of Parliament, where they kept ſtrictly to the words :he act, without extending them to ſimilar caſes.

The expreſſion in the act is indeed in the preterperfect tenſe, *re made*; but I ſhall ſubmit it, whether, conſidering how that ɔreſſion comes to be made uſe of, it ought to be expounded ctly to mean the time of making the contract.

The legiſlature are ſpeaking of contracts then in being, and refore it was natural to ſpeak of them as contracts that *were de*; and in this view the expreſſion will be far ſhort of what vould have have been, if the act had required the entry to ex- ſs the names of the parties for whoſe benefit the contracts re at the time of making; and it may be material to obſerve, that

that in another part of the act that phraſe is uſed, where they are providing for the caſe of a contract, when the ſeller had not the ſtock at the time of the contract: now if it had been intended to have gone ſo far back in our caſe, what reaſon is there why the ſame expreſſion was not made uſe of? The act of Parliament was never intended as a ſnare, to avoid all contracts that were not regiſtred according to the ſtricteſt letter of the law. The only general view (beſides what related to particular perſons) was to ſee a little into the number and extenſiveneſs of the contracts, in order to apply further remedies if there was occaſion.

In a common law conveyance the word *procreatis* (which ſtrictly ſpeaking ſignifies children that *were* born at the time of the feoffment) has nevertheleſs been conſtrued to take in all the iſſue, whether born before the feoffment or after; and yet that is an expreſſion as ſtrongly reſpecting a time paſt as the phraſe made uſe of in this ſtatute; and if in that caſe it was extended to a future time, why not as well in our caſe? eſpecially when by that conſtruction the intent of the legiſlature is anſwered.

2. Admitting this act does require the entry to ſhew for whoſe uſe the contract was at the time of making; even then our regiſtry, if we take it altogether, will be ſufficient. It appears upon the books of the *South-ſea* company (where the deed is entered *in haec verba*) that Mr. *Wilkinſon* was poſſeſſed of ſeveral lottery annuities, which he ſubſcribed in as his own, ſold as his own, regiſtred that contract as ſuch, and which he ſhews continued to be his own ſole property and intereſt to the time of ſuch regiſtry. Is there now after all this any room to doubt, whether this contract was made upon his own account or not? If there be no room to doubt it, and if it be a matter naturally to be collected from this regiſtry; then it is a regiſtry that in the ſtricteſt acceptation of the words is conform to the act of Parliament, and there is an end of their objection that way.

It is ſtated in the caſe, that no evidence was offered, to prove that this contract was for the benefit of any body but the plaintiff: what influence that will have in this queſtion I muſt ſubmit; and alſo another matter that appeared upon view of the *South-ſea* books, which was, that hardly any of the entries were even ſo ſtrong as this ſigning by the plaintiff, it's being for his own proper uſe and benefit.

So that upon the whole matter I muſt ſubmit it, that as by this regiſtry the defendant is fully apprized who he has to deal with, and therefore has no occaſion to go into equity to diſ-

cover

rer who would be intitled to the benefit of the contract, ce he sees at one view that both the legal and equitable in-eft are in Mr. *Wilkinson*; the giving him all this light is per-ming every thing that was required of us by this act of Parlia-nt; and therefore I hope your Lordship will be of opinion, r action of covenant was well brought, and that the question ich has arisen upon this registry shall be determined in fa-ur of the plaintiff.

Fazakerley contra. It must be admitted, that this registry is t according to the words. They require it to shew for whose the contract *was*, the registry only shews for whose use it at the time of registring.

And as it is not within the words, so neither is it within the ason and intent of the act. The preamble takes notice of e great frauds and abuses that had been committed by the te *South-sea* directors, to the prejudice of the publick; and erefore, being made for the benefit of the publick, it ought to carried as far as may be. One main end of this act was, to iscover what contracts the directors were interested in, that the publick might have the benefit of them; and that it should ot be in the power of a director, to set up a nominal per-n, to recover for his private use, in order to defraud the iblick of so much, which was declared to be forfeited. But w will that end be attained if this registry subsists? Not at l. For supposing Mr. *Wilkinson* to have been at first only no-inal, and in trust for a director; may not that director as-gn over the equitable interest after the contract is made, and en that will be a contract for the benefit of Mr. *Wilkinson* the time of registring, though at the time of making it was ot. By this means the act will be eluded, and those fraudu-nt clandestine assignments can never be got at.

There can be no inconvenience in keeping them strictly to e words of the act, for if the transaction be fair, then they ay make the registry according to the words; but if the fact ill not warrant it, I apprehend the legislature never intended give the equitable proprietor a power to change hands, per-aps to the defrauding the publick, or at least the private ontractor.

Mr. *Strange* says it will be sufficient, because now it appears oth where the legal and equitable interest *are*; and so it does, ut that is not enough, the statute intending to give the buyer n opportunity of knowing who had the equitable right when he contract *was made*.

I must therefore insist, that if this registry stands, the intent f the act is not answered; because it is liable to that objec-tion,

tion, that it might at firſt be in truſt for another, which truſt might afterwards be aſſigned or releaſed.

Chief Juſtice. This was tried before me at *niſi prius*, and it being a caſe of very great conſequence, I did not think it proper to determine it there, though I muſt own that I was in no great doubt about it.

It is certain that this regiſtry is not within the words of the act, ſince it is not ſaid that the contract was at firſt made for the uſe and benefit of the plaintiff. But though it be not within the letter, yet I think we are to give this act ſuch a conſtruction as is reaſonable, conſidering the nature and circumſtances of the caſe. I believe the Parliament never intended to avoid contracts upon ſo great a nicety as this, and therefore ſince the plaintiff has ſhewn, that he is the only perſon the defendant can have to do with, or be called upon by, in this matter, I am of opinion the regiſtry is well enough, and the plaintiff muſt have judgment.

Powys Juſtice. I think this is a good regiſtry. There is nothing in the deed that looks like any thing of a truſt, and we are not to ſuppoſe it one. Beſides, conſidering the nature of this caſe, it is not probable that it could be a tranſaction privately for the benefit of a director, becauſe this is not a money ſubſcription, but a ſubſcription of lottery annuities; and every body knows that though in the caſe of the money ſubſcriptions they made uſe of other people's names, yet they were fond enough of ſubſcribing annuities in their own names; and the thing has anſwered, by the Parliament's giving greater allowances to thoſe directors who ſubſcribed in the moſt. The words of the act are *minded to take advantage*, and all they intended was to ſee what bargains were inſiſted on.

Forteſcue Juſtice. The intent of the act was, to let the buyer know, whether he that ſued him was really intitled to the money; you ſhall regiſter your contract, and put your name to it. *This is for my proper uſe*, in a legal acceptation, denotes it was ſo; becauſe being a *choſe* in action it could not be aſſigned. In the nature of the thing ſurely it is well enough.

Raymond Juſtice. This is an act *ex poſt facto*, to lay a clog upon a legal remedy, and therefore ought to have ſuch a conſtruction as the plaintiff contends for. The caſe of the directors was not under conſideration at the time of paſſing this act, their buſineſs having been ſettled before. This deed imports it to be for the benefit of the plaintiff, and no proof is offered to the contrary: we muſt therefore take it to be ſo, and I [illegible] no inconvenience therein. *Per cur'*: Judgment for the plaintiff.

Trinity Term,

10 Georgii Regis. In B. R.

ir John Pratt, *Knt. Lord Chief Justice.*
ir Littleton Powys, *Knt.*
ir John Fortescue Aland, *Knt.* } *Justices.*
ir Robert Raymond, *Knt.*
ir Philip Yorke, *Knt. Attorney General.*
ir Clement Wearg, *Knt. Solicitor General.*

Jenny *versus* Herle.

Pas. 9 Geo. rot. 144.

RROR of a judgment in *C. B.* in an action upon the case, wherein the plaintiff declares, that the defendants according to the custom of merchants drew a bill of ex- e upon *J. P.* whereby they requested him to pay the iff 1945 *l. out of the monies in his the said* J. P.'s *hands be- to the proprietors of the* Devonshire *mines, being part of sideration money for the purchase of the manor of* West Buck- That *J. P.* refused to accept it, and the defendants as rs are liable. There was judgment in *C. B,* for the iff, but upon error in *B. R.* that judgment was reversed, hole court being of opinion, that this appointment to pay a particular fund, which might or might not answer, not a bill of exchange, and exactly like the case of *Jo- r. Laserre in B. R. Pas.* 1 *Geo.* which was a bill drawn officer upon his agent, requesting him to pay out of his growing

A bill drawn payable out of a particular fund is not a bill of exchange.
L. Raym. 1361.
8 Mod. 265.

growing ſubſiſtence; which the court on a ſpecial reſolution delivered by *Parker* C. J. held not to be a bill of exchange, becauſe in the nature of the thing no body would negotiate it, by reaſon of the uncertainty of the fund. And it would be of dangerous conſequence to make thoſe orders, which a man gives to his ſteward or bailiff, no way concerning trade, to be bills of exchange. The judgment of *C. B.* was reverſed.

Crow *verſus* Rogers.

A ſtranger to the conſideration can maintain no action.

IN *aſſumpſit* the plaintiff declares, that whereas one *John Hardy* was indebted to the plaintiff in 70 *l.* upon a diſcourſe between this *Hardy* and the defendant it was agreed, that the defendant ſhould pay the plaintiff's debt of 70 *l.* and that *Hardy* ſhould make the defendant a title to a houſe. Then he avers, that *Hardy* was always ready to perform his part of the agreement, and that the defendant in conſideration thereof promiſed to pay the plaintiff.

The defendant demurs; and it was inſiſted, that there was no conſideration moving from the plaintiff to ſupport this promiſe: and the caſe of *Bourne* v. *Maſon*, 1 *Ven.* 6. 2 *Keb.* 457, 527. was cited, where *A.* being ſeverally indebted to *B.* and *C.* and having a debt due to him from *D. C.* in conſideration that *A.* would permit him to ſue *D.* in his name promiſed to pay *B.* And it was held, that this being a matter of no trouble to the plaintiff, or benefit to the defendant, he was a ſtranger to the conſideration, and could maintain no action.

On the other ſide was cited the caſe of *Dutton* v. *Pool*, 1 *Ven.* 318, 332. where it was held, that *aſſumpſit* lay for the daughter, upon a promiſe by the heir to pay her portion in caſe the father would not ſell timber; and the caſe of 1 *Roll. Abr.* 32. *pl.* 13. where goods were given to *A.* on conſideration to pay *B.* 20 *l.* And it was reſolved, *B.* might maintain an *aſſumpſit*.

The court gave no opinion. *Adjournatur.* And *Paſ.* 12 *Geo.* it was moved again, and without much debate, the court held, the plaintiff was a ſtranger to the conſideration, and gave judgment *pro def'.*

Dominus

Dominus Rex *verſus* Burridge.

IN an information for a miſdemeanor there was a rule for a ſpecial jury to be ſtruck by the maſter, who was to chuſe ›rty-eight out of the freeholders book, out of which each ſide ›as to ſtrike twelve, and the remaining twenty-four were to e returned for the trial of the cauſe. At the trial the de-ndant challenged the array for want of hundredors, and the hallenge was allowed; whereupon the proſecutor moved for n attachment againſt the defendant, as being guilty of a con-mpt of the rule; and upon the motion it appeared, that the efendant's agent in ſtriking out his twelve had expunged all e hundredors.

What a contempt of *B. R.* L. Raym. 1364. *N. B.* The information was againſt him as mayor of *Tiverton* for abſenting at the election day. Andr. 52. 8 Mod. 186. 245. 3 Bac. Abr. 251.

The defendant's counſel inſiſted, it was no contempt becauſe ey were not reſtrained by the rule; and mentioned ſeveral ecedents, where the rules have been expreſs, that the defend-nt ſhould ſtrike out twelve, and not challenge the array for ant of hundredors. In Queen *Elizabeth*'s time, *Regina* v. *Lord Hunſdon* was ſo. *Rex* v. *Kiffin*, 29 *Car.* 2. 3 *Keb.* 740. *pl.* 1. he Attorney General moved to add thoſe words, but it was enied. *Rex* v. *Sherrard*, 1 *Geo.* thoſe words are added *ex enſu.*

Sed per curiam, This is a plain contempt. Does not he de-at the rule, by inſiſting, that the twenty-four, who the rule ys ſhall be returned to try the cauſe, ſhall not try it? Sup-ſe a ſubmiſſion to arbitration be revoked (as by law it may) ter it is made a rule of court, that is certainly a contempt. he ſame in a releaſe procured from the nominal plaintiff in ectment. In Mr. *Gibbon*'s caſe he pleaded ſuch a releaſe *is darrein continuance*; and Lord *Trevor*, who tried the cauſe, id he was bound to allow the plea, if they inſiſted upon it: ut at the ſame time told them, he would lay them by the eels; upon which the plea was withdrawn. This is not aking contempts by implication, but it is the natural con-ruction of the rule, without which the juſtice intended by aking theſe rules cannot be had. He might indeed have had challenge to the polls, becauſe that would not hinder the auſe from going on; for they might have had a *tales*. If there as a rule to reſtrain the party from taking out execution, oes any body think we would ſuffer him to bring an action f debt upon the judgment? *Per curiam*, An attachment was ranted.

Burgefs *verfus* Brazier.

Et taken disjunctively after a verdict.
L. Raym. 1366.
8 Mod. 236.

DEBT on articles for a horfe race, whereby it was agreed to ride without whip *or* ftick, *or* other weapon, befides boots and fpurs, and avers that he rode *fine flagello et baculo vel aliis armis*. *Nil debet* pleaded.

After verdict for the plaintiff it was moved in arreft of judgment, that the averment fhould have been in the disjunctive throughout, whereas upon this declaration he might have one, though he had not both; and *Cro. El.* 348. 1 *Leon.* 124. were cited.

Et per curiam, This would have been ill upon a demurrer, but is well enough after a verdict. The laft *vel* may be taken to disjoin the former *et*, and though the conjunctive fenfe be the moft obvious, yet fince it is capable of being taken disjunctively, it will do. 1 *Ven.* 114. *Salk.* 140. 1 *Mod.* 42. The jury find that he rode without whip and ftick or other arms, which cannot be true if he had either. The plaintiff had judgment.

Between the Parifhes of St. John Baptift in Devifes and St. James in Bifhops Kenny.

Apprentice is fettled where he lies.
Ld.Raym.1371.
Caf. of Set. and Rem. 120. pl. 159.
Foley 220.
8 Mod. 285.
Fortefc. Rep. 321.

UPON a fpecial order, ftating that *A.* was bound apprentice to *B.* and ferved five years in the parifh of *St. John*, but had always lain in the parifh of *St. James* with his father, the feffions adjudge it a fettlement in *St. John's*.

Et per curiam, The order muft be quafhed, the ferving without lying makes no inhabitation, which is neceffary to gain a fettlement in the cafe of an apprentice: and fo it was held in the cafe of *St. Olave Jewry*, and in the cafe of *St. Mary Cole Church* v. *Radcliff*.

Oates

Oates *versus* Machen.

si prius *in* Middlesex, coram Fortescue et Raymond *Justices*.

in action of escape against the marshal, it was alleged, at the prisoner was surrendered to him at the Chief Jus- Chamber in the parish of *St. Bride's*, whereas it appeared the evidence, that it was in the parish of *St. Dunstan*. e Judges held it well enough, this being debt, and the der the only thing material, and that it differed from the trespass, where every part of the declaration is descrip- And the next day

8 W. 3. c. 27. Where in the declaration the description of a place is material *N. B.* The defendant was in execution for the costs in ejectment, and it was held good notice within the statute 8 *W.* 3. c. 27. if signed by the lessor of plaintiff.

At Guildhall, coram King *C. J.* inter

Boddy *versus* Smith.

ECTMENT for a house in the parish of *St. Peter* in *Warda de cheape*; the defendant proved it was in *Warda de* gdon *infra*, and that no part of the parish of *St. Peter* the ward of *Cheape*, and the plaintiff was nonsuit.

Dominus Rex *versus* Moise.

Coram Fortescue et Raymond *Justices*.

DICTMENT against the defendant for tearing a note, ereby he promised to pay to *A. B.* so much money. *A. B.* oduced as a witness, and it was objected, that it was ng to set up his own demand, because if the defendant onvicted, the court would oblige him to give a new note. e Judges allowed her.

Proprietor of note a witness on indictment for tearing it.

Duel *versus* Harding.

Middlesex, coram Fortescue et Raymond *Justices*.

in action for beating his servant, *per quod servitium amisit*, y allowed the servant to be a witness.

Servant witness in action by master for beating him. Vide 2 Str. 944. Sel. Cas. Evid. 106.

Underwood *verſus* Hewſon. Ibid.

Treſpaſs lies for an accidental hurt.

THE defendant was uncocking a gun, and the plaintiff ſtanding to ſee it, it went off and wounded him: and at the trial it was held that the plaintiff might maintain treſpaſs. *Strange pro defendente.*

Lady Coventry *againſt* Lord Coventry. In Canc.

The poſſeſſor of an eſtate has a power to make a jointure, but dies before a compleat execution of the power according to his marriage articles; the remainder-man was decreed to perfect it. S. C. 2 P. Will. Rep. 222. Abr. Ca. Eq. 348. pl. 19. 2 Eq. Abr. 87. pl. 9. 660. pl. 8. 673. pl. 9. Com. Rep. 312. pl. 162. Max. in Eq. laſt caſe. 9 Mod. 12. 10 Mod. 163. Gilb. Eq. Rep. 160.

THOMAS late Earl of *Coventry* being ſeiſed in fee of ſeveral manors, lands and hereditaments, in ſeveral counties in *England*, ſome in poſſeſſion, and other part in reverſion expectant on the death of Lord *Deerhurſt* his eldeſt ſon, and of *Gilbert*, afterwards Earl of *Coventry*, his ſecond ſon (the plaintiff's late huſband) without iſſue male, by his will dated the 24th day of *March* 1698, gave ſeveral parts of his eſtates, therein particularly mentioned, to *Elizabeth* his wife for life, and after her deceaſe to truſtees and their heirs to the uſe of his firſt and other ſons by his then wife in tail male, remainder as to part to the uſe of his ſon *Gilbert* for life and his firſt and other ſons in tail male, remainder to his ſon the Lord *Deerhurſt* for life, with like remainders to his firſt and other ſons in tail male, remainder to his uncle *Francis Coventry* for life, with like remainder to his firſt and other ſons, remainder to his couſin the defendant *William* the preſent Earl of *Coventry* for life, and to his firſt and other ſons, with other remainders over. And as to the other parts of his eſtate ſo deviſed to his wife for her life, to the uſe of his ſon the Lord *Deerhurſt* for life, with remainder to his firſt and other ſons in tail, with like remainders to Earl *Gilbert*, *Francis Coventry*, and the now Earl, for their lives, and their ſons in tail male, with remainders over, remainder to his own right heirs.

He alſo deviſed to his ſaid truſtees and their heirs divers other manors and eſtates, which he had in poſſeſſion and reverſion, to the uſes following, *viz.* As to *Woolſton*, *Sintfield*, *Edgware*, *Griffe*, *Cotton* and *Woolvey*, to the uſe of his firſt and other ſons by his then wife in tail male, remainder to his ſon the Lord *Deerhurſt* for life, with remainder to his firſt and other ſons in tail male, with remainder as to *Woolſton*, *Sintfield*, and *Bearly*, to the uſe of *Gilbert Coventry* for life, with remainders to his firſt and other ſons in tail male, with remainders as to the ſaid manors, and alſo as concerning the ſaid manors of *Edgeware*, *Griffe*, and *Woolvey*, to the uſe of *Francis Coventry* for life, remainder to his firſt and other ſons in tail male, with remainder to the defendant the preſent

Earl

Earl of *Coventry* for life, and to his firſt and other ſons in tail male, with remainders over, remainder to his own right heirs: and as to his manors of *North Littleton*, *South Littleton*, *Offenham*, *Berlingham* and *Deſford*, other parts thereof in poſſeſſion, to the uſe of the Lord *Deerhurſt* for life, with remainder to his firſt and other ſons in tail male, remainder to the uſe of his son *Gilbert*, and his ſons in tail male, remainder to the firſt and other ſons of the ſaid Earl *Thomas* by his then wife, remainder to the uſe of the ſaid *Francis* for life and his ſons in tail male, remainder to the defendant the preſent Earl for life and his ſons in tail male, with ſeveral remainders over, with remainder to his own right heirs: in which will it is provided, "That it ſhould be lawful for any perſon or perſons who ſhould at any time then after by virtue of the ſaid will, or any codicil or codicils to be added thereto, be ſeiſed of any of the teſtator's manors or lordſhips, lands, tenements, or hereditaments, by any writing or writings under his or their hands and ſeals to limit and appoint any ſuch manors or lordſhips (except *Great* and *Little Milton*, and all ſuch other manors where there are any copyhold eſtates) and any of the ſaid meſſuages, lands and tenements or hereditaments, not exceeding the yearly value of 500*l.* to any wife or wives ſuch perſon or perſons ſhould have or happen to marry, for her or their reſpective life or lives, for her or their jointure or jointures, ſo as ſuch perſon or perſons ſhall have with ſuch wife or wives upon ſuch marriage a portion equivalent for ſuch a jointure:" and after making other proviſions in his ſaid will, the teſtator appointed his wife executrix, and died without iſſue by her; who afterwards married *Thomas Savage*, eſq; and is ſtill living. *Thomas* Lord *Deerhurſt* died in the life-time of his father, leaving an infant ſon, afterwards Earl of *Coventry*, who died without iſſue, and the title deſcended to *Gilbert* the ſecond ſon.

Upon a treaty of marriage between Earl *Gilbert* and the plaintiff his ſecond wife, articles of agreement dated the 23d of *June* 1715, were made between Earl *Gilbert* of the firſt part, the defendant Sir *Strenſham Maſters*, and the plaintiff his only daughter, of the ſecond part, and the defendants Mr. *Leigh* and Mr. *Williams* of the third part, whereby in conſideration of *ſuch marriage, and of* 10,000*l. marriage portion* paid down by Sir *Strenſham Maſters* to the ſaid Earl *Gilbert*, he the ſaid Earl *Gilbert* for himſelf, his heirs, executors and adminiſtrators, did covenant, promiſe and agree to and with the ſaid Sir *Strenſham Maſters*, his heirs, executors and adminiſtrators, and to and with every of them by the ſaid articles in manner and form following, (that is to ſay) that he the ſaid *Gilbert* Earl of *Coventry*, or his heirs, ſhould and would at any time after the ſolemnization of the ſaid intended marriage, at the requeſt of the ſaid Sir *Strenſham* — Marriage articles 23d of *June* 1715.

sham Masters, his heirs, executors or administrators, but at the proper costs and charges in the law of the said *Gilbert* Earl of *Coventry*, his executors or administrators, according to the power given to him the said Earl of *Coventry* for that purpose, in and by the last will and testament of the right honourable *Thomas* the late Earl of *Coventry*, deceased, father of the said *Gilbert* Earl of *Coventry*, bearing date on or about the 24th day of *March* in the year of our Lord 1698, or otherwise by good and sufficient conveyances and assurances in the law, well and sufficiently convey, settle, limit and appoint, or cause or procure to be conveyed, settled, limited or appointed, manors, messuages, lands, tenements and hereditaments, of the full and clear value of 500*l.* *per ann.* unto or upon the said *Anne Masters*, for and during her natural life for her jointure, to commence and take effect in possession immediately from and after the death of the said *Gilbert* Earl of *Coventry*, in case the said *Anne Masters* shall him survive, as by the said Sir *Strensham Masters*, his heirs, executors, or administrators, or by his surveyor, or any of their counsel learned in the law, shall be reasonably devised, advised, or required; and also that his heirs, executors, or administrators, should after his death pay her during her life 250*l.* *per ann.* as an addition to her jointure, half yearly, free from taxes.

And it was further agreed that Earl *Gilbert* should deposit 5000*l.* part of the 10,000*l.* in the Bank of *England*, or invest it in the Exchequer notes carrying interest, and deposit them in a box or trunk to be locked up with three locks, upon trust that the defendants *Leigh* and *Williams* should lay out the 5000*l.* in the purchase of lands, and settle them to the use of the Earl for life, with remainder to trustees to preserve contingent remainders, and after his death to the use of the plaintiff for life, to be with the manors and lands of 500*l.* *per ann.* aforesaid, and the said annuity of 240*l.* *per ann.* in full for her jointure and in bar of dower; with other limitations to the use of the children of that marriage; and in default of such issue to the use of the said Earl *Gilbert*, his heirs and assigns, as therein is mentioned, with a power in the trustees, until a purchase, to put out the 5000*l.* at interest, to be applied as therein directed.

The marriage took effect, and the 10,000*l.* marriage portion was paid, and 5000*l.* part thereof, was invested in bank bills, and afterwards lent on a mortgage that had been made of part of the family estate, pursuant to the said articles. And Earl *Gilbert* soon after his marriage gave directions to his steward, to find out proper lands for a jointure, and the steward according to orders perused the family settlements, and could find no other estate than the manor of *Woolvey*, which was free from incumbrances, and which was within the Earl's

Earl's power to ſettle; and the ſaid manor being of little more than the yearly value of 400*l.* the Earl paid off a 1200*l.* mortgage on lands in *Woolſton*, and agreed to make up the 500*l. per annum* out of thoſe lands; and accordingly, at the requeſt of Sir *Strenſham Maſters*, cauſed a ſettlement by way of leaſe and releaſe the 5th and 6th of *July* 1719 to be prepared, which was agreed to by all parties, and approved of by Sir *Strenſham*, and actually ingroſſed; wherein, after recital of Earl *Gilbert*'s power by the ſaid will, and of the articles, the ſaid Earl *Gilbert* is therein mentioned to limit and confirm unto Sir *Strenſham Maſters* and Mr. *Leigh*, their heirs and aſſigns, the ſaid manor of *Woolvey* and ſeveral lands in *Woolſton* therein particularly mentioned, of the value of 500*l. per annum.* And the Earl often expreſſed his intentions to execute the ſaid ſettlement; but by his ſudden illneſs, whereof he died, and the abſence of the ſteward, in whoſe cuſtody the intended ſettlement was at that time, and many other unforeſeen accidents, ſet forth in the pleadings, the ſame was not executed before his death.

Earl *Gilbert* died without iſſue male, leaving by *Dorothy* his firſt wife the Lady *Anne*, now the wife of Sir *William Carew*, his only daughter and heir. But before his death made his laſt will and teſtament in writing, dated 27th of *October* 1719, and thereby (*inter alia*) gave the plaintiff (beſides what was agreed to be ſettled on her by the marriage-articles) 3000*l.* and ſeveral ſpecifick legacies, and made his ſaid daughter the Lady *Anne Carew* ſole executrix, who hath ſince proved his will, and taken upon her the execution thereof.

Francis Coventry alſo died without iſſue male. So that upon the death of Earl *Gilbert*, the defendant *William* (the preſent) Earl of *Coventry* became ſeiſed of divers manors and eſtates under and by virtue of the limitations in the ſaid will, ſubject not only to the 5000*l.* mortgage, but, as the plaintiff inſiſts, to the 500*l. per annum* agreed to be limited to the plaintiff for her jointure: and the plaintiff's bill is, to compel the truſtees in the mortgage to call in the 5000*l.* in order to lay it out in a purchaſe, and to compel Sir *William Carew* and his lady to give a real ſecurity for the 250*l. per annum*, and to pay the 3000*l.* legacy. And againſt the Earl of *Coventry*, that ſhe may hold and enjoy the land contained in the ſettlement intended to be executed, for her life; but in caſe the indenture ſo ingroſſed ſhould prove defective, and not amount in equity to a ſufficient appointment purſuant to the power, then that ſhe may have a ſatisfaction out of the Earl's real and perſonal eſtate.

On the hearing of this cause the 18th of *April* 1722, several cases being then cited, the court was pleased to refer it to Mr. *Conway*, one of the Masters, to take account of the real and personal assets of Earl *Gilbert* come to the hands of any of the parties, who were to be examined on interrogatories, and the Master was also to take an account of the debts of Earl *Gilbert* unsatisfied at his death, and also of his legacies, and to state the real and personal assets, and any other matter he should find difficult, specially to the court: and when the Master should have made his report, this cause was to come on again to be heard thereupon; and also as to the 500*l.* *per annum* claimed by the plaintiff upon the marriage articles. At which time the court (being before attended with the cases then cited) would desire the assistance of some of the Lords the Judges and the Master of the Rolls: and all further directions were reserved until the cause should come to be heard on the Master's report.

The Master made his report, and thereby certified, that the real and personal assets of the said Earl *Gilbert* amount to 13,467*l.* 0*s.* 9*d.* over and besides the 1200*l.* and interest due on the said mortgage of *Woolston*, and that there was 3792*l.* 9*s.* 7*d.* paid and to be paid by the said Sir *William Carew*, in discharge of debts, legacies and funeral charges, besides what is due to the plaintiff, as in the report is mentioned; and the plaintiff's demands out of the said 13,467*l.* 0*s.* 9*d.* are as follows, *viz.* 250*l.* annuity clear of taxes; jewels, furniture, and other specifick legacies, amounting to 1448*l.* 1*s.* 7*d.* halfpenny; and the demand of 500*l.* *per ann.* now in question, with the arrears thereof from Earl *Gilbert*'s death, being four years and upwards.

In this case it was argued for the defendant, that here was no execution of the power limited in Earl *Thomas*'s will, because the covenant with Sir *Strensham Masters* was, that Earl *Gilbert*, or his heirs, should and would, at the proper costs and charges of the said Earl, his executors or administrators, according to the power in the will of Earl *Thomas*, *or otherwise* by good and sufficient conveyances in the law, sufficiently convey lands to the value of 500*l.* *per annum*: and that therefore they could not come into a court of equity for a specifick performance, because they were not specially mentioned in the covenant to be set forth as a jointure; and that the covenant was to be interpreted as a personal covenant, because it was made with *Masters*, his heirs, executors and administrators, either to settle in pursuance of the power, or *otherwise*; so that Earl *Gilbert* had his election, to satisfy the covenant, either by settling the lands under the power by appointment, or by limiting any other lands to the same purposes: and according to the circumstances of this

this caſe he could not be ſaid to have made his election, becauſe from 1715 to 1719, there was nothing done, nor any requeſt by Sir *Strenſham*, to ſettle any particular lands in purſuance of the power. And though about *July* 1719, a draught was prepared and ingroſſed, yet that continued to lie by till *October* 1719, and was never executed; and he had therefore an *animus deliberandi* continuing, and had not taken hold of the power, by appointing the lands of *Woolvey* and *Wooiſton* in performance of the covenant, ſince the indentures were only ingroſſed, and never executed. And in all conveyances of this nature the *animus deliberandi* muſt be ſuppoſed to continue, till the act be compleatly executed. And the power not being executed, this was compared to the caſe of *Lanyon* v. *Wiliams*, where tenant in tail for valuable conſideration covenants to ſell the eſtate-tail and dies; a court of equity would not compel him to execute ſuch conveyance, though there had been a decree againſt the tenant in tail to levy a fine and ſuffer a recovery: and therefore it was urged, that ſince the remainder was veſted before the legal eſtate was executed by Earl *Gilbert*, the court would not compel the remainder-man in this caſe to execute conveyances in purſuance of this covenant.

And here they quoted thoſe caſes of law, which ſay that powers, which go in derogation of remainders veſted, are to be taken ſtrictly; becauſe it was looked upon as dangerous for a court of equity to overthrow by their decrees the intereſts that were originally veſted in the parties by legal conveyances; and the rather in this caſe, becauſe there was a perſonal and ſome real eſtate to ſatisfy the covenant: and this covenant is to be conſidered as a debt due from Earl *Gilbert* on receiving his marriage fortune; and wherever there is a debt, the perſonal eſtate ſhall go in exoneration of the real, which is to ſupport the honour and dignity of the family. And it was further urged, that the heir being expreſly bound in the covenant, the eſtate deſcended to the heir ſhould be firſt liable.

But it was anſwered and reſolved by the court, that after the ſtatute of 27 *Hen.* 8. *c.* 10. for transferring of uſes into poſſeſſion, the courts of common law held, that powers in derogation of eſtates executed were to be taken ſtrictly; and therefore if not purſued, they would not impeach or deſtroy an eſtate already executed by legal conveyances. But in the courts of equity they ſoon found that the conſtruction was too artificial, and not according to natural equity; and therefore they conſtrued theſe powers as a reſervation of ſo much of the ancient dominion of the eſtate, to be under the controul of the tenant for life. *Et cujus eſt dare illius eſt diſponere*; and as of often as any ſuch dominion is reſerved

reserved, the tenant for life may contract about it; and where a marriage contract is made, as this was, in contemplation of the execution of such a power, it was a real lien upon the estate; for both the marriage was had, and the marriage portion paid, in contemplation that the charge should be laid on the estate in pursuance of the power. And therefore a court of equity may decree it against the remainder-man, because he claims under the devise of Earl *Thomas*, whose intention was, that such a charge should be induced on the land; and the present Earl taking the estate under the will, takes it *sub onere*: so that a court of equity may decree the charge to be made good by the remainder-man, because it is decreeing a charge in pursuance of the intent of the testator. And equity in this case was obliged to make such decree, because the first provision was made both for the honour and advantage of the family; since they could not have married according to their quality, without having a power to make such a jointure: and the present Earl takes the benefit of such power, by having such a dominion over the estate for his own advantage, and therefore he is obliged in conscience to discharge the intention of the testator in behalf of Earl *Gilbert*. And this is not like a case of tenant in tail, for when such tenant sells, and dies before the cutting off the entail, equity cannot relieve; because the statute *de donis* binds a court of equity, as it does the courts of law: but if the vendee avoids the statute by a recovery, the courts of equity have never prohibited such a fictitious suit to overthrow the title of the heir in tail. Nay farther, if there was a trust in tail, and the *cestui que trust* should covenant to convey for valuable consideration, there the court of equity would oblige the heir in tail to convey; because this is a creature of equity, and out of the statute. And wherever an agreement is made, and money paid; equity does not consider the form of the conveyance, but takes it as if it were actually executed in the best manner that could be contrived at law; for the substantial part of the agreement is the price, and for that the right is transferred, and what ought to be done is looked upon as done. And therefore if a man article for the purchase of land, and sells all his estate, it would pass the lands in the articles. And this distinction was taken, that if it had been a mere voluntary conveyance, the *animus deliberandi* should have continued till the conveyance was executed; but here being a contract to settle in pursuance of that power, when an estate is afterwards set out, it shall be presumed to be an execution of that contract, which in conscience he was obliged to perform; especially in a case so circumstanced, since nothing can be objected to the value of the lands: and in this case what the persons contracting had in contemplation was an estate executed in pursuance of the power: and

and the words *or otherwise*, &c. are to be looked upon as auxiliary, and to aid the eſtate to be conveyed; ſo that if the Earl had ſettled, or purchaſed other lands in order to be ſettled, according to the contract, he might have exonerated the lands ſubjected to the power by Earl *Thomas*'s will; and ſince the real eſtate now in queſtion was mortgaged, it was neceſſary the covenant ſhould be large enough to bring in all the real and perſonal eſtate of Earl *Gilbert* in aid of the ſettled eſtate, in caſe of deficiency. And therefore the covenant is not to be conſtrued on the one hand ſo ſtrictly, as to ſubject the heir in the firſt place, nor ſo generally as if the word heir was only matter of form, and merely the word of the conveyancer; but the intention was, that he at his election ſhould have a power out of any other eſtate to ſatisfy the covenant, and after his death, in caſe the land contained in the power ſhould be deficient, that all other his eſtate ſhould be ſubject thereto: but ſince Earl *Gilbert* did not ſettle any other eſtate, as he might have done, to diſcharge the contract; it remains as a real lien on the ſettled eſtate in the firſt place to bind the ſame, as what the party had in contemplation to bind by the contract. And this is not like the caſes where equity decrees that the perſonal eſtate ſhall go in exoneration of the real; for the reaſon of that is, that the perſonal eſtate is the natural fund for the payment of debts and legacies, and therefore as far as that is not ſpecifically deviſed, it ſhall exonerate; but the articles of Earl *Gilbert* muſt not be conſidered as a debt, but as a conveyance of ſo much of the eſtate, over which he had a power, becauſe his primary intention was to convey; and if it be conſidered in this light, there can be no application of the perſonal eſtate, ſince there is no debt of which the real eſtate was to be exonerated: and that this was the conſtruction of powers in equity, the following caſes were quoted, *Dr. Garth* v. *Lady Beaufry*, by Lord *Somers*, *Paſch.* 1695. *Henry Beaufry* ſettles lands to the uſe of himſelf for life, then as to part to his wife for life for her jointure, then to the iſſue male of his own body, with ſeveral remainders over; with a proviſo, that if he ſhould have any younger children, it ſhould be lawful for him, by deed or will, executed in the preſence of two or more witneſſes, to limit and appoint any of the ſaid lands (except thoſe in jointure) to ſuch perſons and for ſuch eſtates as he ſhould think fit, for raiſing 500 *l.* a-piece for ſuch younger children, to be paid at ſuch times, and in ſuch manner, as by ſuch deed or will ſhould be declared or covenanted. *Henry* died, leaving ſeveral younger children, but did not make any appointment. Decreed this was a charge upon the land, and bound the iſſue in tail, and ordered the 500 *l.* a-piece to be raiſed for the younger children.

Accord-

Accordingly the covenant in this case was looked on as an execution of the appointment in pursuance of the power.

2 Vern. 379. Lady *Clifford* v. Lord *Burlington*, by Lord Keeper *Wright*, in the *Temple-hall*. Lord *Clifford* had power to settle a jointure not exceeding 1200 *l. per annum*. On his marriage with the plaintiff, he covenants to settle on her 1000 *l. per annum*: he sends to his steward for a particular of lands of that value, and settles according to that particular. After his death it appeared that the lands so settled were but 800 *l. per annum*: the bill was against the remainder-man, to have these lands made 1000 *l. per annum*; and decreed against the remainder-man.

Gill. Eq. Rep. 168. *Parker* v. *Parker*, 15th *June* 1714. Mr. *Parker* had a power to raise 7000 *l.* for younger children, by deed or will executed in the presence of three witnesses. Afterwards by will executed in the presence of two witnesses he charged the premisses with 8000 *l.* for his younger children. Decreed good for 7000 *l.*

Holingshead v. *Holingshead*, 14 *June* 1708, before Lord *Cowper*. A man devises his estate to *A.* for life, with several remainders over, with a power to the person in possession to limit any part of the premisses for a jointure, not exceeding one moiety: the first devisee for life, whilst an infant, marries the plaintiff, and with his mother enters into articles to settle lands of 100 *l. per annum* on the plaintiff for her jointure; but in the articles no notice was taken of the power. Before any jointure made pursuant to the power the tenant for life dies: the bill was against the remainder-man, to have the jointure made good. Decreed accordingly.

Hearle v. *Greenbank*, 3 *Aug.* 1749. Q.

Gilb. Rep. Eq. 167. *Alford* v. *Alford*, at the *Rolls*, 5 *December* 1709. *Gregory Alford* tenant for life, remainder to his first and other sons in tail, remainder to *Francis* for life, to his first and other sons in tail, remainder to the defendant, with a power for *Francis* (after the death of *Gregory* without issue) to make a jointure: *Francis* marries in the life-time of *Gregory*, and before marriage covenants to make a jointure on the plaintiff, and to execute this power when he should come into possession. *Gregory* dies without issue male, and *Francis* survives him, but dies without making a jointure or executing this power: Bill against the remainder-man, to have a jointure made, because *Francis* surviving *Gregory* might have executed this power, and had covenanted so to do. Decreed accordingly.

So

So in the principal case it was decreed, that the plaintiff should hold and enjoy the lands of *Woolvey* and *Woolston*, according to the articles, and the deeds of 5 and 6 *July* 1719. And that the plaintiff, and the defendant the heir, and the Lord *Coventry*, should have their costs out of the personal estate, because Earl *Gilbert* ought to have settled it during his life, and the present Earl had only by his answer laid his case before the court, and had not joined in the examination of witnesses but the plaintiff had examined to prove the allegations of the bill.

Michaelmas

Michaelmas Term.

11 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Justice.*
Sir Littleton Powys, *Knt.*
Sir John Fortescue Aland, *Knt.* } *Justices.*
Sir Robert Raymond, *Knt.*
Sir Philip Yorke, *Knt. Attorney General.*
Sir Clement Wearg, *Knt. Solicitor General.*

Cooper *versus* Ginger.

Where the judgment is against two, a writ of error *ad dampnum* of one only will not lie. S. C. Ld. Raym. 1403.

THE plaintiff recovered judgment in *C. B.* against two defendants, and a writ of error is brought, alleging it to be *ad grave dampnum* of one only, without taking any notice of the other: and *Reeve* moved to quash it, which was done without much argument, upon the authority of a like case, *Mich.* 6 *Geo.* in *B. R. Brewer* v. *Turnerb*, *ante*, 233.

Costs on quashing writs of error are to be given in all cases. 8 Mod. 305.

Then the defendant in error moved for costs, and upon consideration the court were of opinion he was entitled to them, the act for the amendment of the law not being confined to the case of a variance from the record, (which this is not) but having general words, *other defect*, to take in this case.

Then the plaintiff in error brought another writ of error *coram vobis*; and *Reeve* moved to quash that also, as not lying in this court; because the first writ of error being quashed, the record is not removed. He argued, that if the record had been once well removed, and the writ had abated by matter

debors

ebors, as death; in that cafe a writ of error *coram vobis* will ie: but this he faid was never a good writ of error, and the fault appeared upon the face of the record; fo that it is no more, than if an entire ftranger, making a true defcription of the record, had brought the writ of error, which no body can pretend would be a removal of the record.

Serjeant *Comyns contra* infifted, that the record was well removed, though, by a miftake in not joining the other defendant, they could not proceed to reverfe the judgment; and therefore, to fet that matter right, they had brought a writ of error in the name of both. 3 *Mod.* 134. 1 *Roll. Abr.* 753, 929. 1 *Sid.* 104, 139. *Dyer* 356. *b.* *Yelv.* 3, 6. If a writ of error be quafhed for any other fault than variance, *error cor' vob'* lies Co. Ent. 289.

Chief Juftice. If the record was ever well removed, this writ of error *coram vobis* is the only one which could be had. I fhould think, befides a true defcription, that the writ fhould be brought by one who can entitle us to examine the record, and it is admitted, that one defendant alone cannot. I can fee no reafon to conftrue this a removal of the record; fince if it be a removal, it is a removal to no purpofe. *Powys* Juftice *accord.*

Fortefcue Juftice. I am very doubtful in this cafe. A writ of error has in its nature two things, a *certiorari* to remove the record, and a commiffion to examine it; and that is the reafon why it was never amendable at common law, becaufe no court was ever allowed to amend their own commiffion. The *certiorari*-part of the writ is good, if the record be rightly defcribed, as this was; and therefore I fee no inconvenience in conftruing it a removal of the record. I remember a cafe of *Walter* v. *Stokoe* in this court, which was an action againft five defendants; and one being dead, the other four, without taking any notice of that, bring a writ of error; and it was quafhed for the fame reafon as we quafhed the firft writ of error in this cafe; the plaintiff in error there brought a writ of error *coram vobis*, and the caufe was determined upon that, without any objection to the propriety of the writ. Ld. Raym. 71, 151.

Raymond Juftice. I remember that cafe, and it was fo. As to this cafe I fhould think, that when a writ of error goes to remove a record for a particular purpofe, and by fome defect in that writ the purpofe for which it iffued cannot be obtained, the record fhould be taken to be in the fame condition as if no writ of error had been brought. If one defendant only can remove the record, I do not fee why a meer ftranger may not.

Adjournatur. And *Trin.* 11 *Geo.* without much debate they declared, that the writ of error *coram vobis* did lie.

Dominus

Dominus Rex *versus* Theed.

Conviction presumed right if the contrary does not appear. 8 Ann. c. 9. S. C. L. Raym. 1375. 8 Mod. 319. Andrews 84. post, 919. 2 Barnard. K. B. 16. Seff. Caf. 417. * Yet fee a conviction on the game act of 5 Ann. c. 14. in 1 Bur. Rep. 148.

CONVICTION for obftructing an excife officer in coming to weigh candles: and it was objected, that by 8 *Ann.* *c.* 9. the officer has power to enter by day or night; and if by night, then in the prefence of a conftable; and here it is not faid whether it was by day or night; it might be by night without a conftable, and then it was lawful for the defendant to obftruct.

Sed per curiam, That fhould have been fhewn by the defendant, and then he would not have been convicted. It is enough that this conviction * does not appear to be wrong: we will prefume the entry to have been in the day: elfe it would have been faid *in nocte ejufdem diei*. The conviction was confirmed.

Ravenhil's cafe.

Mandamus.

THE court granted a *mandamus* to fwear him in ale-tafter of *Honiton*. It appeared to be a previous requifite to his being chofen port-reeve, who is the returning officer for members of Parliament.

Dominus Rex *verfus* Roberts.

Proceedings upon convictions muft be in the prefent tenfe. S. C. L. Raym. 1376. 6 & 7 W. 3. c. 11.

CONVICTION for profane fwearing quafhed, being *praeftitit facramentum* in the preterperfect tenfe. It was held good in fubftance, being for fwearing 150 oaths *in bis verbis, videlicet by G.* and curfing 150 curfes *in his verbis, videlicet G. damn you*, without repeating each 150 times.

Between the Parifhes of Afhbrittle *and* Wyley.

Long poffeffion is a fettlement till the right is determined. * Seff. Caf. 121. pl. 115. Andr. 5. 8 Mod. 287. Caf. of Settl. and Rem. 116. pl. 156. See 19 Vin. Abr. 172. n.

UPON a fpecial order of feffions the cafe appeared to be, that thirty years fince, *Humphrey Card* built a cottage upon the wafte in *Wyley* belonging to the Earl of *Pembroke*, and lived on it till his death, about three years fince, when it defcended to his daughter *Elizabeth*, then married to *John Darby*; that they entered and enjoyed it three quarters of a year, and then fold the poffeffion of it to *John Wyvel*, who has enjoyed it ever fince without any moleftation from the lord; but no original grant appears. And whether *John Darby* and his family are fettled in *Wyley*, where they lived three quarters of a year in the cottage right of his wife; or in

Afhbrittle

Asbbrittle, which was the place of his last settlement before the marriage, was the question: and by the order of two justices, and the order of sessions, it is adjudged to be a settlement in *Wyley*.

Et per curiam, The order must be confirmed. He lived forty days, in the capacity of a person irremovable; and that is a settlement of itself. Here has been an enjoyment for * *thirty* years: during all which time the lord never claimed any thing. The least that can be made of it, is a title by disseisin: and a descent is cast. This man had undoubtedly a title against all the world, but the lord: and even against him, it may be doubtful, after so long a possession. In ejectment, he might either make or defend a title, by † twenty years possession. Therefore in this case there is no colour to determine against his right, when the lord does not think fit to impeach it: though if he did, it would never be allowed, to determine the title upon an order of removal; but upon an ejectment, only.

* *Twenty.* See Tri. at Ni. Pri. 98.

† See 2 Bur. Set. Cas. 631. pl. 194.

Elliot *versus* Cowper.

THE plaintiff declares, that the defendant *fecit quandam notam in scriptis per quam promisit solvere*. And exception was taken, that here is no signing by the defendant, as the statute requires; and the case of *Taylor* v. *Dobbins*, *ante*, 399. had the words *manu sua scripsit*, which was the ground of the judgment in that case. But in the principal case the court held it well enough, for unless it was signed or wrote by him, it could not be such a note whereby the defendant promised to pay. Judgment for the plaintiff.

Fecit notam per quam promisit solvere, imports a signing. L. Raym. 1376. 8 Mod. 307. *Pas.* 12 *Geo.* *Boyce* v. *Fisher* ruled the same way on demurrer.

Case of the Commissioners of Sewers for Yorkshire.

THE court held, that a *certiorari* to bring up an order made by the commissioners, for the removal of their own clerk, was of common right, and not discretionary, as in the case of other orders, where great inconveniencies may follow by inundations in the mean time.

Certiorari, where discretionary. Fortesc. Rep. 374. 8 Mod. 331.

Dominus Rex *versus* Simpson.

MANDAMUS to the archdeacon of *Colchester*, to swear *Rodney Fane* into the office of churchwarden. He returns, that before the coming of the writ he received an inhibition from the bishop of *London*, with a signification that he had taken upon himself to act in the premisses.

Swearing a churchwarden is only a ministerial act. S. C. 2 R. Raym. 1379. Barnard. K. B. 381. 8 Mod. 325.

Et per curiam, The return is ill. It does not appear that the town of *Colchester* is within the diocese of the bishop who inhibits: besides, the archdeacon is but a ministerial officer, and * is obliged to do the act, whether it be of any validity or not. A peremptory *mandamus* was granted.

* Lord *Raymond* does not mention *this* part of the objection to the return. But see 3 Bur. Rep. 1420.

Townsend *versus* Duppa & al'.

Attorney cannot change *venue* to *Middlesex* where there is another defendant joined. 8 Mod. 316.

AN action of trover was laid in *Worcestershire*; and *Willes* moved to change the *venue* to *Middlesex*, because the action against some of the defendants was as they were commissioners of bankruptcy, and they had privilege, as being barristers or attornies. But the court refused it, saying the privilege could not take place where they are joined in an action with unprivileged persons.

Briggs *versus* Greinfield and Benger.

One defendant overthrows the action after judgment *per* default against the other, it shall be stayed as to both. S. C. L. Raym. 1372. 8 Mod. 217.

TRESPASS against two defendants; one suffers judgment to go by default, and the other pleads a distress for rent, and a licence from the plaintiff to sell the goods, upon which issue was joined, and a verdict for the defendant.

Serjeant *Eyre* moved to stay the judgment against the other defendant, since upon the whole record it appears the plaintiff has no cause of action. 1 *Inst.* 125. *b.* *Salk.* 23. *Cro. Jac.* 134. 1 *Lev.* 63.

Et per curiam, Judgment was arrested as to both.

Skipwith *versus* Green.

The tenant is not estopped by describing lands in the lease. S. C. 3 Danv. 272. 8 Mod. 311.

IN covenant the plaintiff declares, that whereas he had demised to the defendant a house and several parcels of land, which are particularly described, some to be arable, some meadow, and some pasture, and especially two meadows called *Laine*'s meadows, the defendant covenanted to pay 5*l.* per acre for every acre of meadow which he should plough up during the lease, and assigns the breach in ploughing up *Laine*'s meadow, &c. The defendant pleads, that for sixty years past *Laine*'s meadow has been arable land, and by times ploughed up and sowed, as the tenants thereof thought proper; and traverses, that at the time of making the lease it was meadow ground, as is supposed in the declaration.

To

To this the plaintiff demurs; and it was objected by *Reeve*, ιat the leafe being by indenture the defendant was eftopped to y, that what is called meadow in the leafe is of any other naιre; and that though they had not replied the eftoppel, it was ιe fame thing now it came before the court upon a demurrer. nd he cited *Paf.* 4 *Ann. Kemp* v. *Gooday*, where in debt for nt the defendant was eftopped from faying the plaintiff *nil* *ıbuit in tenementis*, it appearing that the leafe was by indenιre. And the fame was ruled this term in the cafe of *Browne Hardwick*. L. Raym. 1154.

Sed per curiam, The indenture is to be conftrued according the intent of the parties, and here the intention was only to ovenant againft the ploughing up real meadow. Every body nows that in deeds of this nature the parcels are very often ken from former deeds, without regard to every alteration of ιe nature of the land: and it would be the hardeft cafe in the orld, that if this land has been arable at one time, and laid own at another, that the tenant fhould be concluded by calling by either of thofe defcriptions. This is not the effence of a ed, as what is ftruck at by *nil habuit in tenementis*. It would carrying of eftoppels too far, fhould we extend them to ιis cafe: therefore we are all of opinion the defendant had a ight to try the fact, whether it was ancient meadow or not. he confequence of which is, that the plea is good, and the efendant muft have judgment.

Welder *verfus* Buckland.

SCIRE *Facias* againft pledges in replevin, fetting out a judgment for the avowant in *C. B. prout per recordum ibidem fidens: quod quidem recordum coram nobis certis de caufis venire cimus*, where the judgment was affirmed. The defendant deιurred, and fhewed for caufe, that it was incongruous to fay ιat the record remains in *C. B.* and at the fame time was reιoved to *B. R.* by writ of error. Informality ill, on fpecial demurrer. 8 Mod. 313.

Serjeant *Branthwayte* would have had it rejected as an unneeffary averment, and then it would ftand with only a right ference to the record remaining in *B. R.*

Sed per curiam, You cannot fay but it is informal, and ιat is enough upon a fpecial demurrer. The defendant muft ave judgment.

Dominus Rex *versus* Chandler.

Indictment. S. C. L. Raym. 1368. 2 Seff. Caf. 5. p. 8. 8 Mod. 336.

INDICTMENT for fecreting a woman big with an illegitimate child, fo that fhe could not be had to give evidence about the father. The defendant demurred. *Et per curiam*, Judgment for the defendant, for it cannot be illegitimate before born, there being always a poffibility that it may be born in lawful wedlock.

Eaft-India Company *verfus* Glover.

Eadem *verfus* Lutman et al'.

Suffering judgment to go by default is an admiffion of the contract declared on.

THE plaintiffs declared upon a fale of coffee at fo much *per* hundred, which the defendant was to take away by fuch a time, or anfwer in damages. There was judgment by default, and on executing a writ of inquiry before Chief Juftice *Pratt* at *Guildhall*, he refufed to let the defendant in to give evidence of fraud on the fide of the plaintiffs at the fale, becaufe he faid the defendant had admitted the contract to be as the plaintiff had declared, by fuffering judgment by default, inftead of pleading *non affumpfit*; and now they were only upon the *quantum* of damages.

The Dutch Weft-India Company *againft* Jacob Senior Henriques van Mofes. In C. B.

Dutch Weft-India company fue for money in *England* which was borrowed at *Amfterdam*, and when it was payable in Bank there. And have judgment. S. C. L. Raym. 1532.

ONE borrowed money of the *Dutch Weft-India* company, which he by articles covenanted to pay *in Bank at Amfterdam. The Dutch Weft-India company* fued thofe articles here in *England*, and called themfeves *Generalis focietas Belgica privilegiata ad Indos occidentales negotiandum*, and laid the articles to be made at *Amfterdam* in *Holland*, *viz. apud London in parochia fanctae Mariae de arcubus in warda de Cheap.*

Upon the trial it appeared, the money was borrowed at *Amfterdam* in *Holland*, and by the covenant was to be paid in *Bank* there: and that this company had never fued by this name before, or ever had any particular name given them by any act of the States; but upon the diffolution of an old *Weft-India* company, it was declared, that there fhould be ftill a general *Weft-India* company, the members of which fhould be privileged to trade to the *Weft-Indies*, and that all others fhould be prohibited.

Now;

Note; The jury found, that this was the fame company that nt the money.

Upon the trial at *nisi prius* before *King* C. J. two points were ·ferved for the confideration of the court: 1. Whether thefe ·ticles could be fued in *England*. 2. Whether this was a good ame for the company to fue by.

Cheshyre Serjeant for the defendant agreed, that where a coveant is made beyond fea, and is to be performed here, or *e conrſo*, an action may be well brought upon fuch covenant in *igland*: but when a covenant is made beyond fea, and is to performed there, it cannot be tried here, becaufe there is no ace from whence the *venue* fhall come, nor can our Judges be formed of the law of that country: and this is refolved in *rwdal*'s cafe, 6 *Co*. 47. *b*. It hath been always held, that if a nd be faid to be made at *Bourdeaux in Regno Franciae*, it wants al at our law; and whether it arifes upon the evidence, or pears upon the pleading, is not material. *Lutw*. 950. Trefs done at *Fort St. George in partibus tranſmarinis*, is not triable re. Lord Chief Juftice (1) *Vaughan* in his treatife of *Wales* ys, if a bond be made in *Wales*, *Ireland*, or *Scotland*, it canit be tried in *England*. The covenant in the prefent cafe, apints the money to be paid at *Amſterdam*, and therefore cannot performed in any other place, and the defendant cannot lige the plaintiffs to accept the money here, but is confined pay it in *Holland*.

(1) At the end of his Reports.

As to the fecond point, whether this be a good name for the mpany to fue by, I apprehend it is not a fufficient name: for is corporation never having any particular name given them, are it enabled to fue even in *Holland*, much lefs in *England*. Corrations made by act of Parliament are to be taken notice of; t when private corporations fue, they muft produce their arter or grant by which they are conftituted, and fhew to the urt that they have a name and a capacity to fue. And he faid at the name by which the plaintiffs were called in the declation, was different from the common name that they are iown by.

Pengelly Serjeant *contra*. This is an action brought for the an of money, which is a thing clearly tranfitory and perfonal; id in fuch a cafe the defendant is a debtor, wherever he goes, id may be fued wherever he can be found. I admit that where appears from the party's own fhewing, that the bond was made : *B. in Regno Franciae*, that the court here is oufted of jurifiction; but in this cafe the covenant is faid to be *apud Amſteram in London in parochia*, &c. and it being not traverfable, the

 court

court hath a ſufficient juriſdiction. It is the common practice to bring actions here upon bills drawn in *Holland* payable in *France* and aſſigned to *Dutch* merchants. An action was brought upon a bond which appeared to be dated at *St. David's* in the *Eaſt-Indies*; and it was reſolved, that if it had been laid in the declaration to have been made at *St. David's* in the *Eaſt-Indies*, *viz. in London in parochia*, &c. it had been ſufficient, and ſuable here. In *Trin.* 7 *Ann. in B. R.* an action of trover was brought for timber cut in *Ireland*; and it was objected, it could not be tried here, becauſe title of land would come in queſtion: But *per Holt* C. J. *et totam curiam*, This action being merely tranſitory, may be ſued any where. This was the caſe of *Brown* v. *Hedges*, *Trin.* 1708. *Vide Styles* 331. *Rogers* v. *Done*. And to this point a caſe was cited by *Dormer* J. where *William Penn* was ſued here for rent, upon a leaſe of lands in *Penſilvania*; and it was adjudged the action well lay.

Salk. 290.

To the ſecond point *Pengelly* ſaid, Though the company had no certain name given them by any act of the States, yet they may collect a name by reputation from their buſineſs; and being always known by that name, may be well ſued by it. He cited the caſe of *Queen's College Oxford*, 11 *Co.* 19, 20, 21. That college had no name given them at their foundation, but having received their foundation, and ſeveral other benefactions from the Queen, they collected by reputation the name of *Queen's College*, by which name they ſue and are ſued. *Hob.* 122, 124. And this preſent caſe is the ſtronger, becauſe there is not any other company that pretends to uſe this name that the plaintiffs ſue by, and they are found by the verdict to be the ſame perſons who lent the money. If a particular name be given to a corporation, and in ſuing, when their name is turned into *Latin*, though there be ſome circumlocution in naming them; yet if it appear to be the ſame corporation, it is ſufficient. So in an information for words, or for a libel, if the words or libel be ſet forth in *Latin*, for the very words need not be ſet forth, the jury may find the defendant guilty of thoſe words.

Per totam curiam, The action is well brought: and they were all of opinion for the company in both points. And the judgment was affirmed in *B. R.* and in Parliament.

Wyvil *versus* Stapleton. 8 Mod. 68, 381.

Shelbourne *versus* Eundem.

ERROR of a judgment in *C. B.* in debt wherein the plaintiff declares, that by writing between him and the defendant it was agreed, that the plaintiff should upon payment or tender of 1360 *l.* by the defendant on or before the day of shutting of the books, transfer to him 200 *l.* *South-sea* stock; in consideration whereof the defendant agreed, that he would on or before the shutting of the books accept the stock, and *would then* pay for the same; with a proviso to enable the plaintiff to sell it out, if the defendant did not accept it: then the plaintiff avers that he was at the *South-sea-house* the day of shutting the books, and then offered to transfer; but the defendant did not appear, whereupon he sold out the stock, and brings his action for the deficiency. The defendant pleads a feoffment in satisfaction, and on demurrer judgment is given in *C. B.* that the plea is good; *ideo querens nil capiat per billam.*

A feoffment is not pleadable in satisfaction of a specialty. 8 Mod. 292.

It was agreed on all hands that the plea was bad, so that the reason on which the court below founded their judgment was not right; but whether upon the whole record the judgment was not warranted was a question.

Reeve objected to the declaration, that the plaintiff had shewed no cause of action, for that the covenant to pay was only on acceptance, and here was only a tender (and that insufficiently alleged) but no acceptance. The defendant covenants to accept on or before the shutting the books, and *then* (that is) upon such acceptance to pay.

Fazakerley contra insisted, they were mutual covenants; or if not, yet the plea of a feoffment in satisfaction admits every thing necessary to entitle the plaintiff to be satisfied. *Cro. Car.* 384. 1 *Vent.* 114, 126. *Hob.* 233, 198. 2 *Saund.* 180. 1 *Sid.* 466. *Show.* 213.

Chief Justice. I think the judgment of *C. B.* ought to be reversed. The construction the defendant puts upon this covenant is a very strange one, for it is no less than to discharge himself of one covenant by the breach of the other: it is true, says he, I did not accept the stock as I ought to have done, and therefore I am discharged from the payment of the money.

This is so harsh, that if any fairer construction can be made of it, I am sure it ought. Now I think the natural import of it to be, that *then* should not relate to the actual acceptance, but only to the time at which he covenants to accept. If so, then as these are mutual covenants, the breach is well alleged in non-payment of the money, and if the plaintiff has failed on his part, it will be no excuse here, because the defendant has his action to right himself. *Powys* J. *accord'*.

Eyre Justice. This not being an action for the whole money, but only for the deficiency, I take it the mutual remedy is gone. And if so, then a tender and refusal are necessary to be averred, to entitle the plaintiff to sell out the stock. This is not a sufficient tender, either as to time or place; as to the time, if nothing be shewn to the contrary, the last part of the day is what the law appoints, and the plaintiff is deficient in that; and as to the place, it should have been averred, that the *South-sea-house* is the proper place, for we cannot take notice of it. *Lancashire* v. *Killingworth*, (*Salk.* 623.) entered *Trin.* 12 *W.* 3. *rot.* 369. *Shales* v. *Seignoret*, *intr.* *Pasch.* 10 *W.* 3. *rot.* 115. and adjudged *Pasch.* 11 *W.* 3. *Lutw.* 516.

Fortescue Justice. If it be necessary to aver a tender, this is certainly naught; but I am not clear that there is any occasion for it. I think the payment is so far from being to be subsequent to, or upon the acceptance, that it is the very first act to be done according to this contract, which is, that the plaintiff shall *upon* paying transfer, and the *adtunc* refers to that time. *Per cur' ulterius concil'*.

A covenant to pay *upon transferring* is mutual.

And *Mich.* 11 *Geo.* it was argued a second time by Serjeant *Pengelly* for the plaintiff, and Serjeant *Comyns* for the defendant; and the court kept them to the point of the mutual covenants, declaring that the tender and the pleading over were both to be laid out of the case.

Serjeant *Pengelly* insisted, that the first act was to be done by the defendant, the covenant on the plaintiff's part being only *upon payment or tender to transfer*, and then comes the clause for the defendant to accept and pay, and the proviso to sell out is on any default of the defendant.

Serjeant *Comyns contra* insisted, that in the nature of the thing there must be something done on the part of the plaintiff, at least he ought to be there, and ready to transfer; and wherever the defendant's act depends upon an act to be done by the plaintiff, it is not enough to say they are mutual covenants.

Adjour-

Adjournatur. And in a few days the Chief Juſtice delivered the reſolution of the court. The objection is, that the plaintiff ſhould have done the firſt act by transferring, or tendering at leaſt, elſe how could the defendant *adtunc accipere et ſolvere proinde*, This depends upon the wording of the indenture and the intent of the parties. It could never be the intention to make the payment depend upon the defendant's own acceptance. *Adtunc* is the time mentioned for the transfer, not the act of transferring, and it would be unreaſonable to oblige the plaintiff to part with the ſtock firſt, ſince every body knows that was not the nature of theſe agreements. The money is not to be paid as the conſideration of a transfer, but of the covenant to transfer; and the true conſideration in this caſe is the remedy, which the defendant has upon the covenant to transfer. We are all of opinion that theſe are mutual covenants, and therefore though there is no tender ſufficiently alleged, yet the declaration is well enough. And the judgment below being for the defendant, when it ſhould have been for the plaintiff, it is erroneous, and ought to be reverſed. We accordingly reverſe it, and give judgment for the plaintiff.

N. B. This judgment of reverſal was afterwards reverſed in Parliament, and the judgment of *C. B.* ſet up again.

Afterwards the court was moved for their direction to the Maſter in taxing the coſts, the plaintiff inſiſting on full coſts to this time, the ſtatute of *Glouceſter*, 2 *Inſt*. 288. extending to all coſts conſequent upon the ſuit.

Sed per curiam: At common law there were no coſts upon any writ of error, and 3 *H*. 7. *c*. 10. and 8 *W*. 3. *c*. 11. extends only to the caſe of affirmance of a judgment, and that very reaſonably; for why ſhould any man in the caſe of a reverſal pay coſts for the error of the court below? We are in this caſe to give ſuch judgment as the court below ſhould have given, that is judgment for the plaintiff, with his coſts to that time. They could have no conſideration of the coſts upon the writ of error, and therefore let the maſter tax the plaintiff ſuch coſts as he would have been intitled to in the court below; but as to coſts upon the writ of error in this court, he can have none.

No coſts on reverſing judgments. 8 W. 3. c. 11.

Aſton *verſus* Blagrave.

THE plaintiff declared, that he was a juſtice of peace, and that upon a *colloquium* of him and the execution of his office, the defendant ſaid, "You are a raſcal, a villain, and a liar."

Words of a magiſtrate, where actionable. S. C. Lord Raym. 1369. Forteſc. Rep. 206. S. C. 4 Bac. Abr. 489. 8 Mod. 270.

After

After verdict for the plaintiff it was moved in arrest of judgment, that these words are not actionable.

Cheshyre Serjeant *pro quer'*. There is a great difference between magistrates and common tradesmen: words of the latter must affect them in their particular way of dealing, but any thing that tends to impeach the credit of the former is actionable. A justice of peace is sworn to do his duty. What can be worse than to call a man a villain? An action lay for claiming a man as a villain, *Keilw.* 34. And the pillory we call a villainous judgment. The word *liar* does not signify a single error from the truth, but denotes a habit of lying. It is actionable to say of a tradesman, "He keeps false books."

Reeve. It must be taken now that the words were spoken in relation to his office, which will much aggravate the matter. I agree, these words spoken of a common person would not be actionable; but the distinction between magistrates and others has been often allowed. *Mo.* 243. *Cro. Car.* 199. 1 *Vent.* 50. 1 *Sid.* 432. 1 *Lev.* 280. 2 *Cro.* 223. *Cro. Car.* 14. Words that are actionable will not be indictable, unless they tend to a breach of the peace; but though not indictable, yet they may be actionable. *Mich.* 4 *Ann. B. R. Regina* v. *Soley* (mentioned in the case of *Regina* v. *Wrightson*, *Salk.* 698.) "Mr. *Soley* is not fit to be a justice, for if a cause "comes before him he'll give it right or wrong for Mr. *G.*" were held not indictable, but yet no body will say that they are not actionable.

Girdler contra. In *Show. Parl. Cases*, 12. amongst others the word *liar* is mentioned as not actionable; and the principal case there was words of a justice, *You are disaffected to the government*, and held no action lay. As to *villain* and *rascal*, they likewise are not actionable. 2 *Cro.* 58. *Yelv.* 64. 4 *Co.* 15. *a.* 2 *Ed.* 4. 4. *b.* *Mar.* 82. *Goldf.* 115. 4 *Co.* 16. *a.* *Mo.* 418. 1 *Roll. Abr.* 57. *pl.* 30. 1 *Vent.* 258. *Salk.* 696. *Hob.* 117. *Cro. Jac.* 90. *Hardr.* 501. 2 *Cro.* 196. 1 *Lev.* 277, 148.

Reeve. In many of those cases there was no *colloquium* of the office, and the words were capable of a good as well as a bad sense, which these are not.

Curia advisare vult. And this term the Chief Justice delivered the opinion of the court, That though *rascal* and *villain* were uncertain, yet being joined with *liar*, and spoken of a justice of peace, they did import a charge of acting corruptly and partially, and therefore there ought to be judgment for the plaintiff.

Hilary

Hilary Term, 1724-5.

11 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Juſtice.*

Sir Littleton Powys, *Knt.*
Sir John Forteſcue Aland, *Knt.* } *Juſtices.*
Sir Robert Raymond, *Knt.*

Sir Philip Yorke, *Knt. Attorney General.*

Sir Clement Wearg, *Knt. Solicitor General.*

Memorandum: Mr. Juſtice *Raymond* was abſent all this Term, being one of the Commiſſioners of the Great Seal.

Whitechurch *verſus* Whitechurch.

In Canc' coram Gilbert *et* Raymond.

SIR *Jeffery Gilbert*, one of the Commiſſioners of the Great Seal, delivered the reſolution of the court.

Where the owner of the fee with a term to attend the inheritance, makes an incompleat deviſe to carry the inheritance, it ſhall not be ſet up in equity as a deviſe of the term. S. C. 2 P. Wil. 236. Gilb. Eq. Rep. 168.

The lands in queſtion were mortgaged to *Edward Whitechurch* for a term of five hundred years, and upon advancement of a further ſum of money, another term of two thouſand years, from the expiration of the firſt term, was made to truſtees, in truſt for the ſaid *Edward Whitechurch*; after this *Edward Whitechurch* bought in the inheritance of the mortgagor.

Edward

Edward Whitechurch being ſo poſſeſſed of both the ſaid terms, and of the inheritance of the ſaid lands, he wrote his will with his own hand, and deviſed theſe lands to *William Whitechurch* his younger brother for life, remainder to *Edward Whitechurch* his nephew in tail, with divers remainders over. But this will was never ſigned or executed in the preſence of three witneſſes, as is requiſite by the ſtatute 29 *Car.* 2. *c.* 3.

It is plain by this will the teſtator intended to paſs an eſtate-tail to *Edward Whitechurch*, which he had power to do by the ſtatute 32 *Hen.* 8. *c.* 1. But by the 29 *Car.* 2. *c.* 3. "That all "deviſes of any lands and tenements deviſeable, &c. ſhall be in "writing, and ſigned by the party ſo deviſing the ſame, or by "ſome other perſon in his preſence, and by his expreſs direc-"tion, and ſhall be atteſted and ſubſcribed in the preſence of "the ſaid deviſor, by three or four credible witneſſes; or elſe "they ſhall be utterly void and of none effect." So that where this ſolemnity is wanting, the ſtatute makes ſuch deviſe of lands utterly void. But in this caſe the deviſor had a term of years in him. Now though a term for years be within the words of the ſtatute, yet the ſtatute doth not extend to it, for the term would have gone to the executors, had it been undeviſed, and it never was the intent of the ſtatute to take any thing out of the hands of the executors: but where the will comes to derogate from the intereſt of the heir, for whoſe ſecurity, among other things, the ſtatute was made, there the will ought to have the ſolemnity of the ſtatute.

It will be ſaid, that if this will cannot paſs the inheritance, yet the teſtator intended ſomething ſhould paſs by this deviſe; therefore the term ſhall paſs, for which the ſolemnity of the ſtatute is not requiſite.

But when the teſtator had the inheritance in him, and deſigned to paſs it as ſuch by this deviſe; nothing elſe ſhall paſs but what he intended. Beſides, the will was not compleat, but under deliberation; and whilſt it was ſuch, you cannot conſtrue that will ſo as to paſs any other intereſt in the mean time, till ſuch time as he had perfected it; and therefore this being a will *in fieri*, a court of equity will not carry it further than the teſtator himſelf has done.

And in this caſe there is to be no argument made from the dominion and intent of the teſtator, for the intent of the ſtatute was to reſtrain the exerciſe of his dominion: and this ſtatute has always had a large conſtruction, in order to remedy thoſe miſchiefs, which it was deſigned to prevent, and therefore it

extends to all eſtates of freehold. For ever ſince the 32 *H.* 8. y which lands are made deviſable, great inconveniencies were ound in the deviſing of eſtates, for want of a ſolemnity. And n the making of this ſtatute, which was contrived by the Lord Chief Juſtice *Hale*, and the moſt learned men of that time, hey went upon the foot of the old *Roman* law, by which at rſt ſeven witneſſes were neceſſary to a deviſe of lands, but afterwards they were reduced to three, the number which this tatute requires: and ſince this ſtatute was made with ſo much are and caution, to prevent thoſe inconveniencies, which ttended the common way of deviſing eſtates before, it ought o be ſtrictly purſued, and no relief be given in a court of equity vhere any part of this ſolemnity is wanting. Therefore in his caſe nothing ſhall paſs by the deviſe, but the inheritance hall go to the heir, and the terms muſt attend it. The decree f the Maſter of the Rolls was confirmed.

Dominus Rex *verſus* Hulſton.

THE court granted an information in nature of a *quo warranto* againſt the defendant for exerciſing the office of ſteward of a court leet: but ſaid they would not grant it in the caſe of a * court baron; that being only a private right, and no court of record.

See 2 Barnard K. B. 221. Andr. 14. *Quo warranto* lies againſt ſteward of a court leet. * Cro. Jac. 259. pl. 20. *contra.*

Strong *verſus* Howe.

MR. *Strong* who had a mortgage on the eſtate of Mr. *Howe*, had depoſited the writings in the hands of his counſel, who upon a propoſal to pay the money delivered the writings to Mr. *Howe*'s brother, who was an attorney, and took a receipt from him to re-deliver them upon demand. Mr. *Howe* the attorney intruſted them with the mortgagor, who immediately took up 200 *l.* and left the writings as a pledge, without the privity of his brother. And now, upon motion againſt the attorney, the court made a rule on him to re-deliver the writings at his peril, otherwiſe an attachment: for they ſaid, they would oblige all attornies to perform their truſt, and how hard ſoever this might be as between him and his brother, yet between him and Mr. *Strong* it ſtood only upon the note, by which he had engaged to return the writings in all events.

Attorney ordered by rule to deliver writings. 8 Mod. 339.

Amyon *verſus* Shore.

IN aſſault it was once well laid, but then went on with a *cumque etiam*, and laid another aſſault: there were intire damages: and it was moved in arreſt of judgment, that the laſt aſſault

Cumque etiam in treſpaſs ill. *Forteſc.* Rep. 370. Andr. 21. Barnard. K. B. 423.

aſſault was not made poſitively charged, but only by way of recital. *Lee contra* would have had the court conſtrued *cumque* as *moreover*: but they ſaid it had been always taken only as a recital in theſe declarations; ſo the judgment was arreſted.

Dominus Rex *verſus* Inhabitantes paroch' ſancti Gregorii in villa de Sudbury in com' Suffolk.

Noctanter.

UPON ſearch of precedents, and oppoſition by the clerks of the plea ſide, it was held, that proceedings upon a *noctanter* muſt be of the crown ſide.

Martin *verſus* Pritchard.

Payment before the day, how to be replied to. 8 Mod. 345.

ERROR of a judgment in *C. B.* in debt upon bond: on the *oyer* the condition appeared to be for the payment of 100 *l.* and intereſt on 5 *December* 9 *Geo.* and the defendant pleads, that before purchaſing the original, *ſcilicet* 1 *December* 9 *Geo.* he paid the principal and intereſt. The plaintiff replies *non ſolvit modo et forma*, and on demurrer judgment is given for the plaintiff.

Strange pro quer' in errore objected, that the iſſue upon payment before the day was immaterial; and cited the caſe of *Merril* v. *Jocelyn in B. R. Trin.* 13 *Ann.* where on the like iſſue a verdict was found for the plaintiff, and the judgment reverſed.

10 Mod. 147.

But the court took a difference between the two caſes. The preſent caſe being pleaded as a payment with intereſt, it muſt be taken as a plea upon the act for amendment of the law, and then the day is not material, the only point upon that ſtatute being whether it was paid before bringing the action.

To this it was anſwered by Mr. *Strange*, that the act for amendment of the law was not applicable to this caſe, the act only giving a plea of payment *after* the day, when the defendant had broke the condition. And as to the intereſt, he ſaid it ought to be ſo pleaded even in the caſe of payment *before* the day, becauſe the bond carries intereſt from the date.

But notwithſtanding this (*Powys* and *Forteſcue* Juſtices being only in court) the judgment was affirmed. *Quaere?*

Eaſter

Eafter Term

11 Georgii Regis. In B. R. 1725.

Sir Robert Raymond, *Knt. Lord Chief Juftice.*

Sir Littleton Powys, *Knt.*
Sir John Fortefcue Aland, *Knt.* } *Juftices.*
James Reynolds, *Efq;*

Sir Philip Yorke, *Knt. Attorney General.*
Sir Clement Wearg, *Knt. Solicitor General.*

Dominus Rex *verfus* Wefton et al'.

INDICTMENT againft fix jointly and feverally for exercifing a trade: quafhed, becaufe there ought to be diftinct indictments. 2 *Roll. Abr.* 81. *pl.* 6.

Cannot indict two perfons together for diftinct offences 2 Seff. Caf. 221. Barnard. K. B. 56. not S. P. See 2 Bur. Rep. 980.

Stead *verfus* Lateward.

UPON confideration the court held, that there muft be the fame notice given of executing a *fcire fieri* inquiry, in the cafe of a common writ of inquiry; and faid it had been fo ruled formerly, *Mich.* 12 *Ann. Crawley* v. *Haward.*

Practice. L. Raym. 1382. 8 Mod. 366. *ante*, 235.

Clarke

Clarke *verfus* Othery.

No more cofts than damages. 2 Com. Dig. 435.

IN trefpafs affault and battery on the plaintiff the declaration went on, *necnon infult' fecit* upon the horfe of the plaintiff. Verdict *pro quer'* and 20*s*. damages; and it was moved to have full cofts on account of the fpecial matter about the horfe; but refufed upon confideration, and the plaintiff had no more cofts than damages.

Dominus Rex *verfus* Epifcopum Ceftriens'.

A deed is good though executed before ftamped. 8 Mod. 364. S. C. S. P.

UPON a writ of error out of the county palatine of *Lancafter*, it appeared upon a bill of exceptions, that a patent produced in evidence was not duly ftamped at the time of fealing, or at the time that it was firft produced; and the whole court were of opinion, it was proper evidence, being ftamped at the time it was produced on the trial; for they faid the act never intended to avoid deeds that were not ftamped, but only to add a penalty to enforce the duty, and here the penalty had been paid. Judgment affirmed.

Phillybrown *verfus* Ryland.

In action for being excluded from the veftry room muft fhew the parifh had a right to meet there. 2 L. Raym. 1388. 8 Mod. 52, 351.

THE plaintiff brought a fpecial action upon the cafe for excluding him from the veftry room, and upon demurrer the court made no difficulty, but that fuch an action was maintainable: however in this cafe they gave judgment for the defendant, it not being averred that the parifh had any property in this room, or right to meet there, fo that for ought appears it might be defendant's own houfe, and then he might let in whom he pleafed, and refufe the reft: and this was a fault in fubftance, and needed not to be fhewn for caufe of demurrer.

Dominus *verfus* Wilkins

Practice.

PER *curiam*, Attachments for a refcue muft be made returnable at a general return, though the original procefs was at a day certain.

Foot

Foot *versus* Prowse Major' de Truro.

THE mayor was to be chosen out of the aldermen, who are *annuatim eligend'*: the fact on a trial at bar was, that the aldermen present at his election had been in several years, and had none of them been re-elected within a year. On a bill of exceptions, the court was of opinion, that the election of the mayor was void for want of an annual election of the aldermen. But upon error in the Exchequer Chamber, and two solemn arguments, the judgment was reversed: and it was held, that the words *annuatim eligend'* were only directory, and that an annual election of them was not necessary to make an election in their presence good: and *King* C. J. *de C. B.* who delivered the opinion of the court, compared it to the case of a constable and other annual officers, who are good officers after the year is out, until another is elected and sworn. The reversal affirmed in Parliament.

Annual officer continues till another is chosen. *post*, 697.

Kent *versus* Kerry.

ERROR of a judgment in *C. B.* in dower, *de tertia parte* of three houses and a tenement. Judgment for the demandant, but reversed; because it does not lie of a tenement. 1 *Cro.* 125, 621.

Dower lies not of a tenement. L. Raym. 1384. 8 Mod. 355.

Dominus Rex *versus* Hearle.

MANDAMUS to swear in one *Pender*, mayor of *Penryn*: return, that an information in the nature of a *quo warranto* was exhibited against him, to shew by what authority he exercised the office of mayor, whereon two issues were joined, one whether he was duly elected, and the other whether he was duly sworn: the first issue was found for the defendant, and the second for the King, whereupon judgment of *ouster* was given against him; and because he was never since elected mayor, he cannot now swear him in according to the command of the writ.

Mandamus lies not to swear one who has had judgment on an information against him for an usurpation. 2 R. Raym. 1447. *post*, 895.

Hussey pro quer'. The question is, whether after this judgment of *ouster* he be intitled to a *mandamus*, to swear him in, in consequence of his precedent election. And I shall insist, that though he was justly punishable for acting before he was sworn; yet his election was not so totally done away, but that it still subsisted. The nature of this corporation appears upon

 the

the writ and return to be, that no particular time is appointed for the swearing, and that he is to hold over; so it is no objection that the year is out. It must be agreed he had once a right to be sworn, this writ gives him no right; he is still liable to be prosecuted, if the first election be gone. It is therefore proper to be determined upon a new information after he is sworn, rather than to refuse to put him in a capacity to assert his right. The return admits the truth of our suggestion in the writ, that *Pender* was duly elected, and has not been sworn: will it not be hard to say, that because he once acted before he was sworn, therefore for the future he shall never act at all? He confesses he did wrong to act before swearing, and submits to be punished as an usurper for so doing; but now says he I am convinced of my error, and am desirous of conforming my self to the rules of law for the future. He had a right to the office before he was sworn, though he had not a right to act; he does not forfeit the office by acting, but subjects himself to punishment.

Besides it is considerable, whether his acting can forfeit the interest which the corporation have in this election; for it appears upon the return, that if this election be gone, the corporation (as the law now stands) is gone also; this being an election upon a death, so as there is no predecessor to hold over. *Old N. B.* 170. 1 *Sid.* 54, 86. 2 *Inst.* 281. 9 *Co.* 28. *Rast.* 540.

The judgment upon an information is not final as to the right, though in a writ of *quo warranto* it is. 1 *Sid.* 54. 1 *Inst.* 293. The judgment here is not that the franchise shall be seized into the King's hands.

This man must be considered as one that got into possession before his time. If a copyholder enters before admittance, the lord may turn him out; but does any body think he is not intitled to be re-admitted? A feoffee enters before livery, but is not he capable of livery afterwards? *Lit.* § 70. 1 *Inst.* 56, 57.

Chapple Serjeant *contra*. We confess the election, and avoid it: we say you were once intitled to the office, but you were guilty of an usurpation, and were excluded upon that account: the words of the judgment are, that in the said office *nullo modo se intromittat, sed penitus abjudicetur et excludatur*. Can any words be stronger to destroy the first election than these? Even in a writ of *quo warranto* they are not. *Rast.* 540. *Co. Ent.* 527, 537, 540, 559. As he does not pretend to any new right, we say he can have no *mandamus* to be sworn into this office.

Curia

Curia advisare vult. And this term, Mr. Justice *Reynolds* eing come into court since the argument of this cause, the ounsel were directed to repeat what they had before offered; nd then the court delivered their opinions.

C. J. The party certainly comes in time for this *mandamus*, hough the year is out, it appearing that he is intitled to hold ver, and that no other person hath been since elected into this ffice. I think the judgment on the information was right, or he then appeared to us as an usurper, and we punished him s such; and I believe no precedent can be shewn where in hese informations the judgment was ever entered in any other anner. If the judgment is right, we must give the words f it their full latitude: they import an absolute exclusion from he office, and are we to intend a *quousque* in any case? or are ot the words of this judgment as strong as the case of a corporate amotion? It seems to me that the election is done away, nd that unless there had been a new election since the judgment, the party is not intitled to this *mandamus*. *Powys* J. ccord.

Fortescue J. A *quo warranto* is the King's writ of right, and s against the crown want of swearing is as much as want of n election: the jury therefore have found in effect, that he ad no title to this office, and then of course he is to be excluded from it by our judgment. I never heard of any other udgment, nor can any thing be more reasonable, than to exclude him who appears to have no title. Where the franchise laimed is such as may subsist in the crown, the judgment is o seize it into the King's hands, but where (as in this case) cannot be exercised by the crown, the judgment is only to xclude the party. This judgment is as strong as a forfeiture r amotion. We have expresly adjudged, that he shall never ake upon him this office, and therefore it would be absurd or us to command him to be sworn in consequence of a right rior to our judgment. If a man who has one right, claims hat in a manner different from his grant, he loses even the ght granted; as in 2 *H.* 7. 11. where one had a grant of a air for one day, and he claimed it as a grant for two; the udgment is that he shall lose his fair, and that grant could ever be set up again.

Reynolds J. I should have had some difficulty in giving this udgment, had I been in court when it was pronounced, for I now of no certain form of words in judgments, but every dgment may and ought to vary according to the circum-

ſtances of the caſe: and it is no new thing to meet with judgments that are only *quouſque*, as I think this might have been. But whatever my opinion might be in that caſe, yet in the preſent caſe I muſt concur with my brothers, becauſe I am bound to take and conſider this as a judgment; and whether he ſhould have been barred or not is not material, ſince in fact he is barred. and will be ſo, till that judgment is reverſed by writ of error. *Per curiam*, The return muſt be allowed.

On error in Parliament adjudged that error does not lie, and the writ quaſhed.

Trinity Term,

11 Georgii Regis. In B. R.

Sir Robert Raymond, *Knt. Lord Chief Justice.*
Sir Littleton Powys, *Knt.*
Sir John Fortescue Aland, *Knt.* } *Justices.*
James Reynolds, *Esq;*
Sir Philip Yorke, *Knt. Attorney General.*
Sir Clement Wearg, *Knt. Solicitor General.*

Morris *versus* Lee.

THE plaintiff declares, that the defendant made a promissory note under his hand, whereby he promised to be accountable to the plaintiff or order for 100*l.* value received, and counts upon the statute.

Note to be accountable for money is within the statute. L. Raym. 1396. 8 Mod. 362.

After verdict for the plaintiff it was moved in arrest of judgment, that this was not within the statute, and that the distinction had always held between negotiable and accountable notes: that no note was negotiable, that was not for the payment of money absolutely, according to the cases of *Appleby* v. *Biddle*, and *Smith* v. *Boheme*, whereas the defendant in this case might discharge himself by payment of the plaintiff's debts or otherwise.

Sed per curiam, There are no precise words requisite to make a promissory note: it is enough if it may be brought

within the intention of the act. This is for value received, and he makes himself accountable to the order; a fourth or fifth indorfee can settle no account with him, therefore we must take the word *accountable* as much as if it had been *pay*, and the plaintiff must have judgment. *Quaere tamen.*

Dominus Rex *versus* Inhabitantes St. Leonard Shoreditch.

Parish rates. Fortesc. Rep. 324.

ON a special order for a scavenger's rate, it was stated, that in the parish there were three divisions, and this rate was made for one only, but that in this division there were no churchwardens or overseers residing, though the parish at large had such officers. At the sessions this rate was quashed, on account that there ought to have been a general rate for the whole parish: and now upon bringing all orders before the court it was offered in support of the first order, that the 2 & 3 *W.* & *M. st.* 2. *c.* 8. had the word *place* as well as *parish*; and therefore a rate for the division was good. *Sed per curiam*, Whatever it might have been in case the churchwardens and overseers had resided in this division, yet this being made for a place that has no such officers, can never be maintained. The sessions therefore did right to quash the rate, and the order of sessions must be confirmed.

2 & 3 W. & M. st. 2. c. 8.

Vaughan *versus* Evans.

Prohibition to a suit in *Wales* where the process was served out of the jurisdiction. L. Raym. 1408. 8 Mod. 374.

A BILL of foreclosure was brought at the grand sessions of *Montgomeryshire*, and the *subpoena* was served in *England* upon the defendant, he and the plaintiff having both estates within the jurisdiction, the mortgaged premisses lying there also. *Et per curiam*, A prohibition ought to go. They can serve no process out of the jurisdiction: and though the court of Chancery here do send *subpoenas* to *Ireland* and *Scotland*, yet the right of doing so was never established.

Fortescue J. said positively they could not do it, and cited *Hutt.* 59. *Cumber.* 468. A prohibition was granted.

Dominus Rex *versus* Venables.

Alehouses. L. Raym. 1405. Fortesc. Rep. 325. Sess. Cas. 267. pl. 210. 8 Mod. 377. Cas. of Set. and Rem. 122. pl. 163.

THERE was an order for suppressing an alehouse; and after that a second order, reciting that he had since continued to sell ale, and therefore committing him for three days, and till he finds sureties not to sell without licence.

It

It was moved to quash the last order for want of shewing a summons or appearance of the defendant; and *Salk.* 181. and the case of *The Queen* v. *Green*, 12 *Ann.* were cited. *Sed per curiam*, We will not presume they acted unlawfully: a summons is certainly necessary, and the justice is punishable if he proceeds without: you never shew notice to the parish that is to be charged in orders of removal. The order was confirmed.

See *Burn's* Jus. I. 466. *Say.* Rep. 304. ante.

Dominus Rex *versus* Inhabitantes de King's Langley.

AN order in nature of a pass for a child of two years old as a vagrant was quashed; it not being of age sufficient to commit an act of vagrancy within the intention of the statute.

Child of two years old cannot be a vagrant.

Hutton *versus* Stroubridge.

ON the 2d of *June* (which was in *Trinity* term) the defendant brought a *habeas corpus*, and put in bail: the plaintiff did not proceed in that term, or in *Michaelmas* term, but in *Hilary* term delivered a declaration; and, upon my motion, the court held the defendant's attorney was not bound to accept it, though but a part of *Trinity* term elapsed after bringing the *habeas corpus*; so as there were not two whole terms.

Practice.

Morfoot *versus* Chivers et ux'.

SCIRE *fieri* inquiry against husband and wife, as she was executrix in her right, brought by the plaintiff as executrix, upon a judgment recovered by her on a bond to her testator. The defendants demurred, and shewed for cause, that it was not alleged in the *sciere fieri* inquiry, that the testator of the plaintiff was dead. And *Martin pro defendente* insisted, that though this might perhaps be well enough upon a general demurrer, yet surely it was informal, and would be ill upon a special demurrer, which was this case.

In a *scire facias* on a judgment recovered *by* an executor, the death of the testator need not be shewn. L. Raym. 1395. cited in Andrews 244. 8 Mod. 373.

Strange contra. In a common *scire facias* by an executor to revive a judgment recovered by the testator, it may perhaps be necessary to shew him to be dead, because that is the first act or process after his death; but in this *scire facias*, which comes after a suit by the executrix, and wherein she has recovered a judgment, which must be taken to be good, there is not the same necessity: it may as well be expected to be repeated in

every procefs, which was never done. When the executrix firft comes into court, fhe muft fhew herfelf to be compleatly fo; but when fhe has once done it (as it muft here be taken fhe has, elfe fhe could not have had judgment *as executrix*) it will be to no purpofe to repeat the fame thing over again. In every declaration it is neceffary to fay the defendant is *in cuftod' marr'*, to give this court a jurifdiction, but it is never taken notice of in the fubfequent proceedings. In the firft fuit the defendants might have pleaded *ne unques executrix*, but not having done it at firft, they have loft the opportunity: if we had averred in this *fcire facias* that the teftator was dead, the defendants could not have been admitted to traverfe that fuggeftion, after a judgment againft them at the fuit of the plaintiff as executrix. In the cafe of the firft procefs after the death of the teftator, they might traverfe that matter, and therefore it may be neceffary to be fhewn; but in this cafe they are too late to object any thing of that nature, and I fubmit this as a good anfwer upon that diftinction.

The court at firft doubted upon the point of its being fhewn for caufe of demurrer, but faid afterwards there was nothing in the objection, and gave judgment for the plaintiff.

On error in Parliament the judgment was affirmed.

There was another exception that the fheriff had returned, that the wife as well as the hufband had converted to her own ufe; but this was over-ruled on the authority of *Bellew* v. *Scott*, *ante*, 440.

Writ of error fued out before judgment is a *fuperfedeas*.

The judgment was pronounced about one of the clock, and the plaintiff fent immediately and put an officer into poffeffion of the defendant's goods, who had before fued out a writ of error; and it ftood equal before the court as to the point of time, whether the execution was firft ferved, or the writ of error firft allowed. The court fet afide the execution, faying, that tho' not being ferved with the allowance it was no contempt, yet in point of law it was a *fuperfedeas* from the moment of pronouncing judgment.

39 Hen. 6. 50. a.

Bourne *verfus* Turner.

Practice. See Tri. at Ni. Pri. 93. Sid. 24. pl. 5. 5 Mod. 333. Rich. Reg. 17. 2 Bac. Abr. 163. Caf. temp. Hardw. 162.

SERJEANT *Comyns* moved on affidavit, that the tenant in poffeffion was a material witnefs for the landlord, that therefore the landlord might be made a defendant in the room of the tenant in poffeffion.

Strange contra infifted it was never done, and it would not make him a witnefs when done. *Et per curiam*, He is liable for the *mefne* profits. The declaration is regularly delivered to the

tenant

tenant in poſſeſſion: it was never done in this court, though Serjeant *Comyns* ſaid it had been done in *C. B.*

Clark *verſus* Godfrey. In C. B.

IT was ſettled by the court on great conſultation, and delivered in a ſolemn reſolution by *Eyre* Chief Juſtice, that an attorney's bill muſt be delivered, on the 3 *Jac.* 1. *c.* 7. before any action brought; that ſo the client may have an opportunity of looking into it, before he is run to any farther expence. 2 *Geo.* 2. *c.* 23. § 23.

Practice in delivering attornies bills. Pract. Reg. C. P. 36. Rep. and Caſ. of Pract. C. P. 27.

Shank qui tam *verſus* Payne.

In Middleſex, coram Raymond, *Chief Juſtice.*

IN a *qui tam* on the ſtatute of uſury, the Chief Juſtice refuſed to let the party to the contract be a witneſs to prove the re-payment of the money, becauſe till that was proved he was no witneſs at all. *Strange pro defendente.*

Party to uſurious contract cannot be called to prove payment. But ſee T. Raym. 191. Caſ. temp. Hardw. 165.

Dominus Rex *verſus* Azir. Ibidem.

ON indictment againſt the huſband for an aſſault upon the wife, the Chief Juſtice allowed her to be a good witneſs for the King, and cited Lord *Audley*'s caſe, *State Trials*, vol. 1.

Wife witneſs againſt huſband.

Dominus Rex *verſus* Fletcher. Ibidem.

TWO were indicted for an aſſault, one ſubmitted and was fined 1 *s.* and paid it: the other pleaded Not guilty, and upon the trial the Chief Juſtice allowed him to call the other defendant, the matter being now at an an end as to him.

Where one defendant is fined, he is a witneſs for the other.

Anonymous. In C. B.

TRESPASS *quare clauſum fregit et quendam taurum perſonae ignotae fugavit, per quod* the plaintiff's gooſberry buſhes were thrown down, *necnon quinque perticas, anglice* poles, *in eodem clauſo erectas, affixatas et exiſtentes fregit, laceravit et ſpoliavit:* verdict for the plaintiff, and a ſhilling damages. And on motion for full coſts the court held, that the words in this de-

Where no more coſts than damages. Gilb. Eq. Rep. 198.

declaration did not import an actual asportation, which must be an entire carrying away; and that the tearing and pulling up the poles was not such an asportation: that this was a case in which a certificate might have been made, because the freehold might have been in question. In debating this case, 2 *Vent.* 48. was cited, which was trespass *quare clausum fregit*, and putting stakes upon his ground, where it was held, that the plaintiff should not have full costs, but if any thing had been taken away, of how little value soever, it had been otherwise. The court did not seem satisfied with the case in 2 *Ven.* 215. which was trespass *quare clausum fregit*, and digging up and carrying away his trees; wherein it appeared upon the evidence, that the defendant had digged up several roots of the plaintiff's trees, and removed them to a place upon the same ground about two yards distance off; and upon a question whether this was such a carrying away as that the plaintiff should have full costs, or only costs according to the statute, *Pollexfen* and *Rokeby* were of opinion, that the plaintiff was to have full costs, because the roots were carried from the place where they were digged, though not removed off from the ground; but *Ventris* thought that it was not such a taking as amounted to an asportation; and to support this opinion they relied on the case of *Franklin* v. *Jolland*, *Hil.* 8 *W.* 3. in *B. R.* which was trespass for breaking and entering the plaintiff's close, and eating his herbs, and for pulling up and throwing down three perches of hedge lately erected; and on a verdict for the plaintiff and 5*s.* damages, he moved for costs notwithstanding the 22 & 23 *Car.* 2. because there was an asportation laid in the declaration, *viz.* pulling up and throwing down the hedge, which could not be done without some asportation, But *per Holt et Curiam*, By asportation is meant a carrying quite away, and not such an asportation as this; so the motion was denied.

Reynolds *versus* Clarke.

Trin. 8 Geo. rot. 474.

Where it must be trespass, and where case. Ld. Raym. 1399. 8 Mod. 272. Fortesc. Rep. 212. See Cas. *temp. Holt* C. J. 22. S. P. *arg.*

TRESPASS for entering the plaintiff's yard, and fixing a spout there, *per quod* the water came into the yard and rotted the walls of the plaintiff's house. The defendant justifies, that before the trespass *John Fountain* was seised in fee of the plaintiff's house and yard, and two other houses adjoining, and demised the plaintiff's house and yard to one *Tyler*, except the free use of the yard and privy for the tenants of the other two houses jointly with the tenant of the plaintiff's house: then he shews how the house of the defendant, which was one of the two houses, came to him, and that he entered the

the yard and fixed the ſpout for his neceſſary uſe, to carry off the rain, *prout ei bene licuit*. The plaintiff demurs. And

Reeve pro defendente inſiſted, that this exception amounted to a licence of the party, and that a diſtinction has always been taken between a licence in law, as to go into a tavern, and the licence of the party, and that this being of the latter ſort an action of treſpaſs will not lie; but if the ſpout be a prejudice, the plaintiff muſt right himſelf by an action upon the caſe. 11 *Co. The ſix Carpenters* caſe. This is an action of treſpaſs brought for a nuſance upon our own poſſeſſion.

Et per Chief Juſtice, Though he had a right to enter into the yard, yet it is conſiderable, whether if he abuſes that right to the detriment of another, he is not in the ſame caſe with every other treſpaſſer. *Et per Forteſcue* Juſtice, Treſpaſs is a poſſeſſory action, and how does this invade the plaintiff's poſſeſſion? The difference between treſpaſs and caſe is, that in treſpaſs the plaintiff complains of an immediate wrong, and in caſe, of a wrong that is the conſequence of another act. *Et per Raymond* Juſtice, That diſtinction is perfectly right. I remember a caſe in *B. R. Courtney* v. *Collett*, which was for the defendant's diverting his own water-courſe in his own land, *per quod* the plaintiff's land was overflowed; after a verdict *pro quer'*, it was often debated, whether this was an action of treſpaſs, or upon the caſe, and at laſt judgment was for the plaintiff, who had brought treſpaſs only. Ld. Raym. 27

The court ſaid it was a nice caſe, and therefore they gave not their opinion, but ordered an *ulterius concilium*.

After a ſecond argument to the effect of the former, the court delivered their opinions this term. Chief Juſtice, We muſt keep up the boundaries of actions, otherwiſe we ſhall introduce the utmoſt confuſion: if the act in the firſt inſtance be unlawful, treſpaſs will lie; but if the act is *prima facie* lawful (as it was in this caſe) and the prejudice to another is not immediate, but conſequential, it muſt be an action upon the caſe; and this is the diſtinction. The caſe I mentioned the laſt time of *Courtney* v. *Collett* was a plain treſpaſs, and the account I then gave of it from my memory was miſtaken: it was *Hil.* 9 *W.* 3. in *B. R.* treſpaſs for taking fiſhes, *necnon pro eo quod* he broke down the bank of the river, *per quod* the water iſſued and other fiſhes went away: after verdict for the plaintiff, it was moved in arreſt of judgment, that the latter part was caſe, and not joinable with treſpaſs; but the court held that was a treſpaſs, and what came under the *per quod* was only matter of aggravation. There was another caſe in *B. R. Hil.* 8 *Ann.*

Leveridge

Leveridge v. *Hoskins*. That was case for digging trenches, whereby the water was drawn away from the plaintiff's river; it was moved in arrest of judgment, that this was trespass; but the court said, that it not being laid to be a digging upon the plaintiff's ground, the action upon the case was most proper: and I take that and this to be the same case, the defendant having a right to enter the yard, and do the first act, which is here complained of, I think this should have been an action upon the case, and that trespass will not lie.

Powys accord. Et per Fortescue Justice, Trespass will not lie for procuring another to beat me; if a man throws a log into the highway, and in that act it hits me; I may maintain trespass, because it is an immediate wrong; but if as it lies there I tumble over it, and receive an injury, I must bring an action upon the case; because it is only prejudicial in consequence, for which originally I could have no action at all. *Et per Reynolds* Justice, The distinction is certainly right; this is only injurious in its consequence, for it is not pretended that the bare fixing a spout was a cause of action, without the falling of any water; the right of action did not accrue till the water actually descended, and therefore this should have been an action upon the case. *Per curiam*, Judgment for the defendant.

Michaelmas

Michaelmas Term

12 Georgii Regis. In B. R.

Sir Robert Raymond, *Knt. Lord Chief Justice.*

Sir Littleton Powys, *Knt.*
Sir John Fortescue Aland, *Knt.* } *Justices.*
James Reynolds, *Esquire,*

Sir Philip Yorke, *Knt. Attorney General.*

Sir Clement Wearg, *Knt. Solicitor General.*

Wyat *versus* Essington.

TRESPASS for entering the plaintiff's house, and taking *diversa bona et catalla ipsius Sarae adtunc et ibidem inventa*: after verdict for the plaintiff, it was moved in arrest of judgment, that this was too general. 5 *Co.* 35. And without much debate the court were all of opinion, that this was not maintainable, and so the judgment was arrested.

Taking *bona et catalla* is too general in trespass.
2 R. Raym. 1410.
Fortesc. Rep. 377.
4 Bur. Rep. 2455.

Dominus Rex *versus* Sir William Lowther.

THE court refused to grant an information in nature of a *quo warranto* against Sir *William Lowther* for erecting a warren, it being only of a private nature. And *Fortescue* Justice said, he knew it formerly attempted and denied.

No information for erecting a warren.
L. Raym. 1409.
Sess. Cas. 369. pl. 293.
Andr. 15.

Smith

Smith *versus* Key.

Practice.

IN a *quantum meruit* the defendant pleaded a tender on the 4th of *May*, *ante diem exhibitionis billae:* the plaintiff replied, *non obtulit ante diem*, *&c.* and to oust the defendant of the benefit of the plea, made up the book with a general *memorandum*, that would refer to the first day of the term, which was before the 4th of *May*. I moved on an affidavit that the tender was upon the 4th, and no writ taken out till the 6th of *May*, that the plaintiff might be obliged to make his *memorandum* special, according to the truth of the fact: and after a rule to shew cause, the same was ordered accordingly.

Pocklington *versus* Peck.

Where a *scire facias* is abated by a plea, there shall be no costs.

ERROR was brought of a judgment in *C. B.* in an action there by a *feme sole*: to the *scire facias quare executio non*, the plaintiff in error pleaded in abatement, that the defendant in error was married since the judgment, and before the issuing of the *scire facias*. Upon this *Reeve* moved on behalf of the defendant in error, to quash their own *scire facias*; and *Strange contra* insisted upon costs. *Sed per curiam*, It is the same in a *scire facias* as in an action, where you plead in abatement and the plaintiff's writ is abated, he pays no costs. Had there been no plea in abatement, and the party had moved to quash his own writ, we should have made him pay costs. The writ was quashed without costs.

Pether et al' *versus* Shelton.

On tender pleaded, the money must be paid into court, or the plaintiff shall take judgment.

THE defendant pleaded a tender with a *profert in curia* of the money; and on a certificate that no money was paid in, *Strange* moved to set aside the plea. *Et per curiam*, It is no plea, and the plaintiff might sign judgment.

N. B. I did not venture to advise my client to do this, because in another case this term, where a plea in abatement was put in without *affidavit*, and the plaintiff signed judgment; the court set it aside.

Flower *verſus* Comit' Bolingbroke.

ABOUT twenty years ſince the plaintiff obtained judgment againſt the then Earl of *Bolingbroke*, but by the careleſſneſs of his attorney it was never entered up, though he had charged the plaintiff for doing it, and had been paid his bill. The attorney being dead, whereby the plaintiff had loſt his remedy againſt him, and there being a decree in Chancery for the payment of theſe debts in a courſe of adminiſtration; the plaintiff, to have a preference before other creditors, moved the court for leave to enter up the judgment *nunc pro tunc*. But upon conſideration the court refuſed to do it, (though by not being docquetted it could not affect purchaſers) it being at ſuch a diſtance of time, that the preſumption was, that the debt was ſatisfied.

The court will not give leave to enter up a judgment of twenty years ſtanding *nunc pro tunc*. See Barnes. 37.

Sherman *verſus* Alvarez.

ACTION by original in *B. R.* The defendant on *oyer* pleaded in abatement, that the writ was never returned: and it was moved by *Fazakerley*, to ſet the plea aſide, becauſe there was not an affidavit to verify it; for the intent of the act was, that the plaintiff ſhould not be delayed by being obliged to take iſſue, unleſs when the plea came in there was ſome cauſe to believe the truth of it.

Affidavit to plea in abatement where neceſſary. L. Raym. 1409.

Lee contra obſerved, that the act did not confine the affirmance of the plea to the oath of the party, but to *any other probable cauſe*; and what can be more probable that this writ was never returned, than when the plaintiff in giving *oyer* of it has not ſet it out. *Sed per curiam*, When you demand *oyer*, it is only *oyer* of the writ: whether it be returned or not is a matter of fact, wherein the plea not being verified by *affidavit*, it muſt be ſet aſide.

The Company of Mercers and Ironmongers of Cheſter *againſt* Bowker.

ERROR of a judgment in the grand ſeſſions of *Cheſter*, whereby a judgment given in the mayor's court of *Cheſter* was reverſed for an error in fact: the error aſſigned and found on record was, that the action was properly commenced and tried before a mayor who was no party; but that after the verdict, and before the judgment, one of the company of mercers was choſen

In actions before a mayor he muſt not appear to be a perſon intereſted.

chofen mayor, and gave judgment for the plaintiffs. The court of grand feffions reverfed the judgment, and upon error in *B. R.* it was argued by *Reeve*, that the verdict being before a right perfon, the judgment thereupon, which was but matter of form, might be well enough. 2 *H.* 4. 4. *Bro. Err.* 32. *Parol remand.* 2. *Cro. Eliz.* 320.

Fazakerley contra. The defendant had no opportunity in the court below to be relieved, it being after the verdict, *Pearfon* v. *Parkins*, *Hil.* 3 *Geo.* The judgment is the only material part; for as to the verdict, that is given by the jury, and there being a judgment for damages to the plaintiffs, this man was interefted, and therefore could not be a judge.

Et per curiam, This was very properly affigned as error in fact, and that was the firft opportunity the defendant had to take advantage of this matter: he had no day in court, either to admit or deny the jurifdiction: he could only move in arreft of judgment, had it been a fact appearing upon the record, as it was not. My Lord *Hobart* carries it fo far as to fay, that an act of Parliament to make a man judge in his own caufe would be void: if the defendant could have been admitted to fuggeft this matter below, muft it not have been tried, and been tried before this man? The judgment of reverfal in the grand feffions muft be affirmed.

Parker *verfus* Thoroton.

One challenged fworn as a talefman, ill. Ld Raym. 1410

A Juror on the principal pannel was challenged, and afterwards fworn on the *tales* by a wrong name, and though no fault was found with the verdict, yet the court granted a new trial.

Pees *verfus* Major', &c. Leeds.

Mandamus to reftore muft be directed only to the body that had power to amove.

UPON the return of a *mandamus* it appeared, that the power of amotion is in the mayor, aldermen *et al' de communi concilio*: and it was moved by Serjeant *Pengelly* in arreft of judgment, that the writ was directed to the mayor aldermen *and* common council, which infers that the mayor and aldermen are no part of the common council, for want of the word *al'*, which is in the power of amotion. *Et per curiam*, The writ fhould be directed to the body who are to do the act: here is no body in this direction but who muft join in the act; this is only repeating the feveral conftituent parts of the corporation, and the mentioning the intire common council, after the mayor and aldermen, is but a repetition *quoad* the mayor and aldermen. The writ is well enough, and there muft be a peremptory *mandamus*.

The,

The case of the bail of Boise and Sellers.

BOISE and *Sellers* were brought up by *habeas corpus* from *Winchester* gaol, and were returned with two civil suits and several Exchequer informations for frauds in the customs. It was moved on behalf of the bail in the civil actions, that they might be at liberty to surrender, according to 25 *E*. 3. *c*. 19. To which it was answered by the Attorney General, that the King had a prerogative to hold his debtor in what lawful gaol he pleased, (*Salk*. tit. *habeas corpus*). However the court would never turn them over, till they were satisfied as to the reality of the debts, and its being an application by the bail: whereupon a reference was made to the master, and it appearing the next day on his report, that the civil actions were for just debts, and actually brought before any of the crown's informations, they were turned over to the marshal, upon the surrender of the bail.

The King's debtor may be brought up and surrendered in a civil suit. See S. P. in 1 Burr. Rep. 339, 409.

Hatton *versus* Isemonger.

Intr. Trin. 11 Geo. rot. 324.

IN an action upon several promises the defendant pleaded a foreign attachment, and lays the custom to be, that the plaintiff shall swear his debt; but in setting out the case upon the attachment pleaded, he did not shew any oath. And upon a general demurrer the court held it a fatal exception, the defendant not having pursued his own custom. *Lat*. 208. *Cro. El*. 713. *Trin*. 7 *Geo*. *Flewster* v. *Hackshaw*, the same case. *Judicium pro quer'*.

Foreign attachment how to be pleaded.

Cooper *versus* Spencer.

AFTER verdict for the plaintiff, *Strange* moved in arrest of judgment, that it was an action of assault and battery, to which the defendant had pleaded *son assault*, and the plaintiff had replied *de injuria sua propria*, concluding to the country; and, without any *similiter* on the part of the defendant, had carried the cause down to trial.

Want of a *similiter* not aided, or amendable. 8 Mod. 376.

Serjeant *Girdler e contra* would have maintained it, because there was an issue joined upon the *vi et armis*. To which it was answered, that that had been held to be immaterial, *Stratford* v. *Neale*. And the court inclining to arrest the judgment, the

Ante, 482.

Serjeant at another day moved for leave to amend, and cited many cases to prove that a *similiter* was but form, and amendments on misjoining of issues were infinite. *Cro. Jac.* 502, 67. *Fitzh. Amendment* 32. 8 *Co.* 161. *b.* *Dy.* 160. 1 *Roll. Abr.* 200. *Cro. El.* 435, 752. 2 *Roll. Rep.* 59.

Strange contra, admitted a misjoinder of the issue would be helped, the 32 *H.* 8. *c.* 30. expresly mentioning it; but the objection here was not matter of form, for the defendant was not obliged to join issue, he might demur; and in many cases the replication of *de injuria propria* was demurrable to: that it not being pretended the issue book was right, there was nothing to amend it by.

The court were all of opinion that it was a fatal objection, and not amendable; so the judgment was arrested.

Dominus Rex *versus* Minify et al'.

On motion to submit to a fine, affidavits read denying the fact.

* *legal.*

THE defendants were returned rescuers, on *mesne* process. And upon motion to submit to a fine, the court said, they must take the return to be true: but they permitted the defendants in mitigation of the fine to shew that in fact there was no * *actual* arrest, it being in the night. And the court only fined them 1 *s.* a-piece. They said that anciently there was a settled fine for rescuers, but of late the courts had fined according to their discretion, upon considering the circumstances of the case.

Hale *versus* Cove.

Where the jury drew lots, the court set aside the verdict, though it was according to evidence.

THE jury having sat up all night, agreed in the morning to put two papers into a hat, mark'd *P.* and *D.* and so draw lots; *P.* came out, and they found for the plaintiff, which happened to be according to the evidence and the opinion of the Judge.

Upon motion for a new trial, it was agreed that the verdict must be set aside; but the question was, whether the defendant should pay costs; the court inclined to give the plaintiff costs, comparing it to the case of a verdict against evidence: but at last it was agreed that the costs should wait the event of a new trial.

Snell

Snell *versus* Timbrell.

ON a motion for a new trial, it was held, that desiring a juror to appear in his cause, which was between a miller and a baker, was no ground to set aside the verdict. And the court remembered the case of the Duke of *Leeds*, who wrote a letter to a juror, desiring him to attend, and you will oblige your humble servant, *Leeds*; which was thought no reason to set the verdict aside.

What is not labouring a juror. 11 Mod. 111. pl. 7. Com. Rep. 602.

Haley *versus* Fitzgerald.

IN debt upon a bail bond, it was objected on demurrer, that the plaintiff had not shewn, that the defendant in the original action was arrested, and the act for amendment of the law confines the assignment of a bail bond to such actions wherein the party is arrested. *Et per curiam*, The words of the act are so, but we must give them a liberal construction: after mentioning an arrest, it goes on and says, *the person against whom such process is taken out*, which are general enough to take in this case. It would be of mischievous consequence, if a bail bond taken civilly, without exposing the party by an arrest, should not be as effectual as if there had been an actual arrest: and *Fortescue* J. remembered the case of *Watkins* v. *Parry*, *Trin.* 7 *Geo.* where the court for this reason refused to let the defendant traverse the arrest. The plaintiff had judgment.

In actions upon bail bonds need not shew an arrest. 4 An. c. 16.

Ante, 444.

Gore *versus* Gofton.

UPON an execution against the defendant the court was moved on behalf of *Sadler* the defendant's landlord, for a rule on the sheriff to levy and pay him a year's rent; and the question came upon this, whether the sheriff was to have his poundage, and from whom. After several motions the court made a rule for him to pay the landlord without any deduction. They inclined that this was in the nature of a farther execution, and that the sheriff was intitled to his poundage, but from whom they gave no opinion, it not being before them as to any thing but the case of the landlord. *Strange pro Sadler*, the landlord. 8 *Ann.* *c.* 14.

On execution the landlord's rent shall be paid without deduction. 8 Ann. c. 14.

Dominus Rex *versus* Johnson.

Trial at bar ordered in a misdemeanor.

AN information was exhibited by order of *B. R.* against the defendant for neglects and abuses in his office of justice of the peace in relation to deer-stealers; and it was moved on behalf of the crown, on affidavit of the defendant's having 700*l.* *per annum*, and there being above thirty witnesses for the prosecutor, that it might be tried at the bar: and the case of *Regina* v. *Wakefield*, the town clerk of *Litchfield*, who fixed up a paper reflecting upon a jury, which was tried at the bar, was mentioned; and also the case of auditor *Harley*, where the matter in dispute was a trifle, but like to be of long examination; upon which authorities the court granted a trial at bar in this case. Mr. Attorney said, had it been an information exhibited by him, he would have had a right to bring it to the bar if he had thought fit. *N. B.* The defendant was convicted and fined 400*l.* and committed till paid.

Ante, 52.

Dominus Rex *versus* Warne.

Bastard chargeable only where born.

INdictment for taking a bastard child born out of the parish of *A.* and bringing it into that parish, and there keeping it privately without notice to the churchwardens, and with intent to charge the parish. The court quashed the indictment, because it appeared, the parish could not be burthened, the bastard being born out of the parish of *A.*

Obrian *versus* Frazier.

Scire facias may be served immediately before the return is out.

MR. *Ketelby* moved to stay proceedings on a *scire facias*, because it was not served till the day before the return. *Sed per curiam*, If it lay four days in the office, that is all which is required: the summons may be made any time before the court is up on the day of the return.

Barnard. K. B. 344.

Trin. 4 *Geo.* 2. *Bland* v. *Perry*, it was so ruled again, on great debate. *Strange pro quer'*. And *Mich.* 4 *Geo.* 2. *Williams* v. *Mason*, it was ruled that it must lie four days in the office, as well where a *scire feci* is returned, as a *nichil*.

Gibson

Gibson *versus* Hudson's Bay Company.

In Canc. Assisten' Raymond et Price.

THE plaintiff as assignee of the effects of Sir *Stephen Evance* a bankrupt, brings his bill against the company, oblige them to suffer him to transfer stock. The company ist, that Sir *Stephen Evance* was their banker, and greatly in- oted to them, and that upon the clause in the bankrupts act, iich directs the commissioners to state the account between itual dealers, they shall be allowed to hold the stock, and count only for the balance, if any shall appear against them. id of this opinion was the court, and decreed according- ly.

Stock a pledge to the company. *N. B.* In the quotation of this case in Abr. Eq. Ca. 9. it is stated that there was a by-law which subjected every member's stock to his debts to the company, on which the decree was founded. But the general doctrine was exploded. 7 Vin. Abr. 125. pl. 2.

Carter *versus* Fish. In B. R.

DEclaration for words, and then it goes on *quorum quidem falsorum verborum propalationis praetexu idem Carolus non so- n in bonis, nomine, et in negotiis suis honestis, multipliciter laesus et erioratus existit, verum etiam occasione verborum praedictorum, procurationem* of the defendant he was taken up and car- d before a justice (the words charging him with stealing a 1). There was a verdict for the plaintiff and 1*s.* damages; d it was moved the last term for full costs, and *Salk.* 206.). *Car.* 140. *Salk.* 642. *Cro. Car.* 163, 307. were cited: d this term the Chief Justice delivered the opinion of the irt, that the plaintiff should have full costs, because this s not laid as an aggravation, but as a distinct fact; he ke the words, and he procured him to be carried before a tice.

Where no more costs than damages.

2 R. Raym. 1589.

Blunt *versus* Mither. In C. B.

TRESPASS for breaking and entering the plaintiff's house, and keeping the plaintiff out of the use of the use, with a *continuando* for a month, whereby the plaintiff is put to great expences to regain the possession, and in the ean time lost the profit and use of it: there was a verdict *o quer'* and 2*s.* 6*d.* damages. And upon motion for full sts, they were *denied* by the court, for this is a plain tres- ss, *quare clausum fregit*, and the *per quod* is only aggravation; d in this case the title to the freehold might have come in

Where no more costs than damages. Gilb. Eq. Cas. 197, 198. S. C. *verbatim. decreed* 3 Bur. Rep. 1284.

question,

queſtion, and if ſo there ſhould have been a certificate of the Judge, which not being in this caſe, the plaintiff can have no more coſts than damages.

Shelling *verſus* Farmer.

At Guildhall coram Eyre *C. J.* de C. B.

Seizing an houſe in the *Eaſt-Indies* is not triable here.

IN an action of treſpaſs and impriſonment for facts done in the *Eaſt-Indies*, the plaintiff laid them all (being tranſitory) in *London*, and *inter alia* declared for ſeizing the plaintiff's houſe ſituate *apud London praed' in parochia et warda praed'*. It was objected *pro def'* that the treſpaſs as to the houſe was local, and they could not give evidence of ſeizing a houſe in the *Eaſt-Indies*. And *Eyre* C. J. refuſed to let the plaintiff give evidence as to the houſe, comparing it to the caſe of rent for a houſe at *Barbados*, where it has been held you may bring covenant for the rent in *England*, but an action of debt, which is local, cannot be brought here.

In the courſe of the evidence it appeared, the action was brought againſt the defendant for an impriſonment by him as governor of a factory in the *Eaſt-Indies*: and for his defence he alleged, that he had orders from the company ſo to do, and appealed to the company's books of letters, &c. which he deſired might be produced.

Eaſt-India company not obliged to produce book of letters, &c.

I attended on behalf of the company, to deſire to be excuſed, alleging that theſe were not of the nature of publick books, which every body has a right to have acceſs to, and of which copies are evidence; whereas theſe related only to the private tranſactions of the company: and it might be of miſchievous conſequence, if in every action wherein the company is not concerned, they ſhould be obliged to lay open the ſecrets of their trade, and diſcloſe to all the world a whole ſeries of letters and correſpondence between them and their agents: however we had the books and papers there, and ſubmitted to the directions of the court.

The Chief Juſtice ſaid he would not oblige the company to produce them, and ſo left us to our liberty; whereupon we refuſed to produce them, and they were carried back again to the *India* houſe. The action was againſt the defendant as deputy governor: and on Not guilty he gave in evidence a releaſe given by the plaintiff to the *Eaſt-India* company in purſuance of an award, whereby reciting he had ſuſtained ſeveral injuries by the company's agents, particularly the deputy governor, therefore they award him 1000*l.* and order him to give a general releaſe. The defendant being no party to that

releaſe

releafe, could not plead it, but the Chief Juftice allowed him to give it in evidence in mitigation of damages; and thefe not being private papers, I confented on behalf of the company that they fhould be produced.

The plaintiff in reply would have called the arbitrators, to prove that they refufed to take into confideration the occafion of this action, which was for the private perfonal wrong: but the award and releafe having general words fufficient to take in all, the Chief Juftice would not fuffer any evidence to be given to contradict the award; fo the jury found for the plaintiff (as they could not help doing, the defendant having pleaded *Non cul'*) and gave him a fhilling damages.

Where an award is made to take in all matters, fhall not be admitted to fhew any thing was not taken into confideration.

Morris *verfus* Martin.

At Guildhall, coram Raymond, *Chief Juftice.*

ACTION for meat, &c. provided for defendant's wife. The defendant proved fhe went away from him with an adulterer: and the Chief Juftice held, that the hufband fhould not be charged for neceffaries for her, though the plaintiff who provided for her had no notice; and he faid, Chief Juftice *Holt* always ruled it fo. And he put the cafe of an apothecary who took a fick woman into his houfe, being the wife of a country gentleman, from whom fhe had gone away with an adulterer. So my client the plaintiff was nonfuit.

Where a wife goes away with an adulterer, the hufband cannot be charged for neceffaries. *Mich.* 8 *W.* 3. *Todd* v. *Stoakes*, at *Guildhall.* R. Raym.

Martin et al' *verfus* Horrel. Ibidem.

THE plaintiffs were goldfmiths, and one *Stone* their apprentice over-paid a bill 10 *l.* and in an action for money had and received to the plaintiff's ufe, the Chief Juftice allowed *Stone* to be a witnefs; though it was objected, that unlefs the money was recovered back from the defendant, *Stone* would be anfwerable to the plaintiffs. But the Chief Juftice faid, he did it *ex neceffitate* of the thing, and it would be of mifchievous confequence, if in tranfactions of this nature a goldfmith's fervant fhould not be a witnefs. So the plaintiffs recovered the 10 *l.*

Goldfmith's fervant who over-pays money is a witnefs in action for it again. Sel. Caf. Evid. 113.

Weaver *versus* Boroughs. Ibidem.

Where there is a special agreement the plaintiff cannot go upon a general *indebitatus assumpsit*.

THE plaintiff declared on a special agreement for the hire of a horse at 2 *s.* 6 *d.* *per diem*, and to keep him so many days and return him safe at the end of the time. There was likewise an *indebitatus assumpsit* for the hire. And on the trial the plaintiff could not prove the special agreement in the manner he had laid it, and therefore his counsel would have had recourse to the *indebitatus assumpsit* to recover only the hire: but the Chief Justice was of opinion, that the agreement for 2 *s.* 6 *d.* *per diem* being laid as part of the special agreement, which was not proved, he could not let them separate that clause, and recover for the hire, as they might have done on a general *indebitatus assumpsit*; it not being a debt, unless the agreement had been proved. And he put the case of a contract for goods at a certain price, where the plaintiff is never suffered to recover upon the *quantum meruit*. So the plaintiff was called.

Wilkinson *versus* Lutwidge. Ibidem.

In action against acceptor of bill need not prove the hand of drawer.
Ld Raym. 444. 4 Vin. Abr. 250. pl. 12. 3 Bac. Abr. 610.

CASE upon a bill of exchange against the acceptor. And it was objected, that we should not be admitted to prove the acceptance, until we had proved the hand of the drawer. And a difference was taken between this case, and the case of an action against the indorsor, who is liable though the bill be not signed by the person who is supposed to draw it; because an indorsor is in the nature of a new drawer, whereas an acceptor is not liable, unless the bill was fairly signed by the drawer. But as to this the Chief Justice was of opinion, that the proof of an acceptance was a sufficient acknowledgment on the part of the acceptor, who must be supposed to know the hand of his own correspondent: but he said it would not be conclusive evidence, and therefore if the defendant could shew the contrary, the reading the bill on behalf of the plaintiff should not preclude him.

What amounts to an acceptance of a bill of exchange.

Whereupon the bill was read, and the question came upon the validity of the acceptance: as to which the case was this: The bill was drawn from *New England* for a sum of money advanced there, to fit out a ship that had put in there, after having been taken by pirates. The bill was drawn upon the defendant, who was the freighter, and he living at *Whitehaven*, the plaintiff applied to a merchant in *London*, who was his correspondent, to get him to send this bill and another of 150 *l.* drawn by the

the ſame perſon, and on the ſame account. He ſent both bills incloſed to the defendant, who by letter acknowledged the receipt of them, and writes thus: "The two bills of exchange, "which you ſent me, I will pay them in caſe the owners of "the *Queen Anne* do not; and they living in *Dublin*, muſt firſt "apply to them; I hope to have their anſwer in a week or "ten days. I do not expect they will pay them, but I judge "it proper to take their anſwer before I do; which I requeſt "you will acquaint Mr. *Wilkinſon* with, and that he may reſt "ſatisfied of the payment." In another letter he writes, "I "have not had an opportunity of ſending the bills you ſent "me, to the owners of the *Queen Anne* to *Ireland*, but will "take the firſt opportunity, and then ſhall remit to the gentle-"man concerned, according to my promiſe."

The defendant upon this paid the 150*l.* bill; but in this action inſiſted, that it did not amount to an acceptance, being only conditional, to pay it in caſe the owners of the *Queen Anne* did not; and his promiſe to procure it from them was in favour of the plaintiff. But the Chief Juſtice was of opinion, that it was rather in favour of himſelf, and he having undertaken to write to them, it was not incumbent on the plaintiff to ſhew any application to them; and as to the acceptance, it was in his opinion a very ſtrong one; the bill was preſented to the defendant; ſays he, This is a good bill, and I will pay it: you need not proteſt it, for it ſhall be paid; I only deſire, that for my convenience you would ſtay till I can write to the owners in *Ireland*, who I do not expect will do any thing in it: this will be of ſervice to me; and as to you, you ſhall be ſecured, for I promiſe you ſhall have the money in all events. See 3 Bur. Rep. 1663.

The bill being payable thirty days after ſight, the jury gave us intereſt from thirty days after the date of the firſt letter, which acknowledged the receipt of the bill. Intereſt given from the time of acceptance.

Syderbottom *verſus* Smith.

Coram Eyre *Chief Juſtice* de C. B. *in* Middleſex.

IN an action againſt the indorſor of a promiſſory note; the Chief Juſtice directed the jury, to find for the defendant, becauſe the plaintiff had not proved diligence to get the money of the drawer; being of the old opinion, that the indorſor only warrants upon the default of the drawer. Q.

In action againſt indorſor muſt prove demand on drawer. *Vide* Salk. *tit.* Bill, &c. Ante, 441, 515. *contr.* See 2 Bur. Rep. 669.

Norcott

Norcott *versus* Orcott. Ibidem.

9 G. c. 28. A creditor allowed to prove debtor not intitled to his discharge on the *Mint* act. Ante, 507.

THE defendant pleaded the *Mint* act; and the issue to be tried was, whether he was a shelterer within the *Mint* on the 11th of *Feburary* 1722. To prove him at large at that time, the plaintiff called several of the creditors; and it was objected, that they were not good witnesses to prove it, being interested in the event of the question: and I cited the case of * *Shuttleworth* v. *Bravo*, where on an issue out of Chancery to try whether a bankrupt had forfeited the allowance out of his estate by gaming contrary to the act, it was refused to let any of the creditors be sworn to prove a gaming, because that was swearing to increase their own dividend.

* Ante, 507.

The Chief Justice allowed that case, but said that affected all the creditors, whereas here the plaintiff only was at present concerned. He said it would go to their credit, but not to their competency; so they were sworn.

Powell *versus* Hord, vic' Oxon'.

Coram Raymond, *Chief Justice*, *in* Middlesex.

Sheriff's bailiff no witness to prove attempt to arrest. Ld. Raym. 1411.

ACTION for false return of *non est inventus* on *mesne process*. And the Chief Justice refused to let the defendant prove by the bailiff who had the warrant, that he had endeavoured to execute it, because he had given security, so that it was his own cause in effect.

In action for false return on *mesne* process the jury may give the whole debt in damages.

The sheriff not being able to excuse the return; it was attempted to mitigate the damages, by shewing that the defendant was still visible, and it being only *mesne* process, the debt was not lost, and the measure of damages should be only the expence of the process. The Chief Justice in his direction inclined to give the plaintiff the whole debt of 43 *l.* (it being an action of debt on a judgment) because there was but a possibility of the plaintiff's recovering against the original defendant. He said it would depend on circumstances, and if the defendant had been a man of estate, and so no danger; he should think the debt would be too much to give: but that not being this case, the jury found the whole debt in damages, with the opinion of the Chief Justice. And afterwards the defendant moved for a new trial; and upon the Chief Justice's stating the case, as it appeared upon the evidence, the whole

court were of opinion, the Chief Juftice had done right, in refufing the bailiff to be a witnefs; and that as to the point of damages the verdict was right, and there ought to be no new trial.

Stone *verfus* Lingwood.

At Guildhall, coram Eyre.

THE plaintiff was captain of a fhip, and the defendant owner: the plaintiff brought over a fmall parcel of elephants teeth on his own account, and a large parcel for the defendant, who entered the whole at the *Cuftom-houfe*, paid the duty, and had the whole delivered out to him; and not redelivering to the captain his parcel, an action of trover was brought. And it was infifted for the defendant, that the plaintiff fhould fhew a tender of the duty, otherwife the goods were in the nature of a pledge, and he was not bound to deliver them: but the Chief Juftice faid, that would not juftify the defendant in keeping them, for he had his action for the money; and if he would fhew what the duty came to, it might be deducted in damages. Which was done accordingly.

In trover the defendant cannot juftify detaining goods till money laid out upon them is paid.

Ryley *verfus* Hicks.

In Middlefex, coram Raymond, *Chief Juftice.*

THE plaintiff declares, that 24 *February*, 1723, fhe demifed to the defendant a chamber, a cellar, and half a fhop, *habendum* from *Lady-day* then next for a quarter of a year, and fo from quarter to quarter, fo long as both parties fhall pleafe, at 5 *l. per* quarter.

Leafes by parol to commence at a future day, are good.

It was objected by *Whitaker*, that this being to commence at a future day, was but a leafe at will fince the ftatute of frauds. The Chief Juftice at firft thought it a good objection, but upon farther confideration he was of opinion, that the exception was not confined to leafes that were to commence from the time of making, but was general as to all leafes that were not to hold for above three years from the making. So the plaintiff had a verdict. *Strange pro quer'.*

Titus *versus* The Lady Preston.

At Guildhall, coram Gilbert, *Chief Baron.*

Change-alley computation is to be taken by calendar months.

DEBT on bond: the defendant pleaded, that the money was lent from 24 *August* to 24 *May*, for a premium of 150 Guineas. And on evidence it appeared, the bargain was for nine months. It was objected, *pro quer'*, to be a variance, because months must be taken to be lunar, and not calendar, and then it does not come so far as the 24th of *May*. But the Chief Baron thought it well enough, the general understanding being of calendar months in cases of this nature. So the defendant had a verdict. *Strange pro defendente.*

Moreland *versus* Bennett.

In Middlesex, coram Raymond, *Chief Justice.*

If any interest was paid upon an old bond after the day, it must be a plea upon the statute. 4 An. c. 16.

TO a bond of thirty years standing, the defendant pleaded *solvit ad diem*, and relied upon the presumption: the plaintiff in answer could only prove payment of interest two years after the time mentioned in the condition, but gave no evidence of any receipt or demand for twenty-eight years past. The Chief Justice was of opinion, that this plea of payment at the day, was to be taken as strictly in this case, which went only upon the presumption, as in any other case; and the plaintiff having falsified the plea, by shewing a payment of interest two years after, it was not enough to say the other twenty-eight years were enough to let in the presumption; because, to take advantage of that, the defendant should have pleaded upon the act for amendment of the law, that he paid the money after the day, in which case it would have been with him upon this evidence.

Dominus Rex *versus* Fox. Ibidem.

Laying a wager doth not incapacitate for a witness. 2 Lev. 152. 6 Mod. 31.

ON an indictment for an assault, it was proved, that the prosecutor had laid a wager, that he should convict the defendant. And the Chief Justice held him to be a good witness for the King, though it might go to his credit.

Fowler

Fowler *versus* Sir Thomas Samwell.

At Guildhall, coram Raymond *C. J.*

FOWLER being the surviving partner of *Niccols*, brought an action upon the following note, and likewise declared on an *indebitatus assumpsit*, "Received and borrowed of *Richard* "*Niccols* and co. 4500 *l.* which I promise to repay with inte- "rest, on *his* transferring to me or order 550 *l. South-sea* stock." The tender of stock was proved to be after the death of *Niccols*. And the Chief Justice was of opinion, that it being tied up to a tender by *Niccols* (who had time during life, if not hastened by request) no tender after his death could make this an absolute debt recoverable upon an *indebitatus assumpsit*: but the plaintiff must go upon the special count. *Strange pro quer'*.

Where a debt is to arise upon a condition subsequent, there must be an exact performance to intitle the plaintiff to recover on a *general indebitatus assumpsit*.

Grammer et al' *versus* Nixon.

At Guildhall, coram Eyre *C. J.*

A Goldsmith's apprentice sold an ingot of gold and silver upon a special warranty that it was of the same value *per* ounce with an essay then shewn. Upon the evidence it appeared he had forged the essay, and that the ingot was made out of a lodger's plate, which he had stolen. And the Chief Justice held the master was answerable in this case. *Strange pro def'*.

Master liable for fraud of apprentice. Sel. Cas. Evid. 124.

Burnaby's case.

In Canc. coram Domino King.

TOMS and *Allen* having recovered judgment against him, he was surrendered by his bail, and then charged in execution; after which the plaintiffs in that action prefer their petition to the Lord Chancellor, as creditors, for a commission of bankruptcy, which issued; but was superseded by the bankrupt's petition, the Chancellor being of opinion, that the body of the debtor being in execution, it was a satisfaction of the debt in point of law, so that they were not creditors, who could petition. *Strange pro creditoribus*.

He who has the body in execution cannot be a petitioning creditor. Read. Stat. Law. 189.

The

The Duke of Somerset *versus* France et al'.

Tenant for life by a marriage settlement of a manor, is intitled to a general fine from the customary tenants of that manor, upon the death of the last admitting lord. Fortesc. Rep. 41. 6 Vin. Abr. 109. pl. 5.

UPON the death of her grace the Duchess of *Somerset*, the Duke her husband claimed a general fine of the several customary tenants of the several manors of *Cockermouth*, &c. in the county of *Cumberland*, which were the inheritance of the Duchess. And the Duke having assessed their fines, and the tenants having refused to pay them, the Duke brought his bill in the court of Chancery, to establish his right to these fines, as next admitting lord.

The bill set forth that *Jocelyn* Earl of *Northumberland* was seised of the said manors in fee, and that upon his death they descended to his daughter and heir the lady *Elizabeth*, who afterwards was married to the Duke of *Somerset*, and that upon such marriage she levied a fine of the said manors, to the use of herself for life, remainder to the Duke for life, remainder to their first and every other son in tail, with other remainders over. That upon the marriage of Lord *Hertford*, who was the eldest son and heir of the said Duke and Duchess, recoveries were suffered of the said manors, to the use of the Duchess for her life, remainder to the Duke for his life, remainder to the Lord *Hertford* in tail, with other remainders over. Then the bill set forth, that it was the custom of these several manors, for the lord or lady thereof for the time being to admit the several tenants of the manors to their respective estates, and that by virtue of such admittance the several tenants had a right to hold their respective estates, during the joint lives of such tenant, and such admitting lord or lady. That in consideration of such admittances from the lord, the tenants have time out of mind respectively paid to such admitting lord a fine or *gressum*, which hath been generally assessed by the lord's steward at a court held for that purpose, called the court of dimissions. And that these fines or *gressums* are called the general fines, and are due to the next succeeding lord upon the death of the last admitting lord; by whose death there is a general determination of the estates of the tenants. That there are likewise other fines, which by the custom are due to the lord from these tenants; and those are, where the tenant dies, then his heir, who has a right to be admitted to his father's estate, is obliged to pay the lord a fine for such admittance. And where this tenant aliens his estate, the lord, upon the admission of the alienee, has a right to a fine; and these fines which thus happen upon the death or alienation of the tenant are called *dropping* fines.

General fine.

For the meaning of the word *gressum*, vide *Rastal's Terms of the Law*. *Spelm. Gloss.* 263, 269.

Dropping fines.

The fines the Duke demanded by this bill, were the general fines, which he insisted were due to him as next admitting lord,

lord, upon the death of his lady, the Duchefs of *Somerfet*. And the bill fet forth, that the Duchefs being the lady of thefe manors, and having married the Duke, a court of dimiffions was held in the names of the faid Duke and Duchefs, in order to grant the tenants new eftates, their former having been determined by the death of Earl *Jocelyn*: and at fuch court, admittances were granted to the feveral tenants, *habendum* at the will of the lord, according to the cuftom of the faid manors, during the joint lives of the faid Duchefs and the faid tenant. That the defendants (being tenants of the faid manors) held their eftates under fuch admittances, till the death of the faid Duchefs; and that fhe being dead, the Duke became lord of the faid manors, and the tenants eftates being determined by the death of the Duchefs, their admittances being only for their joint lives, the Duke, as next admitting lord, had a right to a general fine. And the bill fet forth, that the Duke, in purfuance of this right, had called proper courts, and had regularly affeffed the defendants fines; and that feveral of the tenants of thefe manors had fubmitted to pay their faid fines; but that the defendants, with feveral others, had refufed, under a pretence that a general fine was not due to the Duke, but was to be paid to the heir after his death. The bill therefore prayed that the Duke's title to thefe general fines might be eftablifhed.

The defendants in their anfwer admitted the feveral allegations in the bill, and that the Duke was intitled to be tenant by the curtefy. They infifted that the fines which they were obliged to pay, were known and afcertained by cuftom, and that the lord was bound by fuch cuftom, and could not, without their being parties, create any eftate to a ftranger, which would fubject them to any extraordinary fines. They infifted that by the cuftom of thefe manors a lord who was tenant by the curtefy, or lady tenant in dower, had no right to a general fine; and that they were only obliged to pay a general fine to the lord who comes in by defcent, or to him that comes in, *in loco haeredis*. They infifted that although the Duke was become tenant for life of thefe manors by the Duchefs's death, yet no fine was due to him; for if he had been tenant by the curtefy, no fine would have been due, and his claiming by fettlement cannot better his cafe; for then it would be in the power of the lords of fuch manors, to multiply the tenants fines, and greatly burthen their eftates, if every fuch lord who hath an intervening eftate by fettlement fhould be intitled to a general fine. Anfwer.

Upon the 11th of *June* 1725, this caufe came to be heard before the Lord Chancellor *King*.

Serjeant

Serjeant *Pengelly*, and *Yorke* Attorney General, argued for the Duke: that the Duke by this ſettlement was a purchaſer, and ſtood *in loco haeredis*. That the tenants having accepted admittances to hold during the life of the tenant and the life of the Ducheſs, and the Ducheſs being dead, their eſtates were neceſſarily determined: and the fines being by cuſtom due to the next admitting lord, and the Duke of *Somerſet* being ſuch lord, the fines were undoubtedly due to him, and there was no pretence that the payment of them ſhould be poſtponed: nor is this any wrong or hardſhip upon the tenants, for this was a juſt and honeſt ſettlement, made without the leaſt appearance of fraud, and upon the moſt valuable conſideration in the law: nor is it any inconvenience to the tenants, for their eſtates will ſtill depend upon the life of the lord, who admits them; and the life of a tenant for life, is as good as the life of a tenant in fee. It is in proof from ſeveral of our depoſitions, that tenants in dower, and tenants by the curteſy, have admitted in ſuch caſes, and have received general fines; and theſe inſtances determine the preſent queſtion, and prove that the Duke hath an unqueſtionable right to the fines which he demands.

Wearg, Solicitor General, for the defendants argued, that the payment of theſe fines depends intirely upon the cuſtoms of theſe manors: and though the tenants eſtates ſhould be determined by the death of the Ducheſs, yet it does not neceſſarily follow from thence, that the Duke is intitled to a general fine, unleſs there be a cuſtom to ſupport his claim. Theſe fines were originally payable only to the heir, or a purchaſer, and were paid in nature of a relief. We have many inſtances in our depoſitions, where tenants in dower and tenants by the curteſy have demanded theſe fines, and the tenants have refuſed to pay them; and it is the received notion throughout all the counties where theſe ſort of cuſtomary eſtates prevail, that only the heir who comes in by deſcent, and he who comes in *in loco haeredis*, are intitled to a general fine.

This ſettlement which the Duke claims by, does not alter the nature of his eſtate; it is only a life eſtate, and what the law would have given him; it does not enlarge his eſtate, but only exempts him from being puniſhed for waſte. The tenants are ſtrangers to this ſettlement, and are not at all concluded by it, and it muſt be conſidered as a fraud upon them, if it was intended to create ſuch an eſtate in the Duke, as would neceſſarily multiply their fines and encreaſe the burthen upon their eſtates.

We admit that dropping fines have been paid to tenants in dower and tenants by the curteſy; but no argument can be

drawn from thence, that they are intitled to a general fine: and if the rule, that every admitting lord is intitled to a general fine, ſhould prevail; then tenants for years of thoſe manors, who are *domini pro tempore*, would be intitled; and the conſequence of that would be, that ſhort leaſes of theſe manors might be made, and the tenants be thereby oppreſſed by frequent and extravagant fines.

But what the defendants chiefly inſiſt upon is, that there is no cuſtom in any of theſe manors, or in any other manor of the ſame tenure, which can ſupport the Duke's demand of a general fine; yet as the depoſitions contain contrariety of evidence upon this point, the faireſt way of determining this queſtion ſeems to be, by directing an iſſue, in which this cuſtom and the Duke's right may be tried.

King Lord Chancellor. The firſt queſtion ariſes upon the determination of the tenants eſtates; and they were undoubtedly determined upon the death of the Ducheſs of *Somerſet*; for the grants or admittances being to each tenant to hold for his life and the life of the Ducheſs, the eſtate of each tenant is neceſſarily determined by her death.

The next and principal queſtion is, whether a fine is due to the Duke from his tenants upon the death of his Ducheſs. And in the reſolving this queſtion it is firſt to be conſidered, upon what account theſe general fines become due: now it appears from the nature of theſe admittances, that upon the death of the laſt admitting lord, all the eſtates of the tenants, which are held under his admittances, are determined; and their eſtates being ſo determined, it is neceſſary for the tenants, before they can have any new eſtate, to have a regrant from the ſucceeding and next admitting lord, which regrant they have a right to, and that right gives their eſtates the denomination of *tenant-right-eſtates*: from hence it appears, that the fines which are paid, are paid upon account of the admiſſion to the new eſtate; and therefore that lord who hath a right to admit, hath a right to the fines; the lord grants the tenant a new eſtate, and in conſideration of that, a fine becomes due to him from the tenant. The only queſtion then ſeems to be, whether the Duke hath a right to admit. And the tenant ſeems to agree that he has; for they allow that if a particular tenant dies, the Duke, upon the admiſſion of his heir, is intitled to a dropping fine: Now can the Duke be intitled to this dropping fine, if he be not the admitting lord? And if he hath a power to admit, and hath a right to a fine upon the determination of a particular eſtate by the death of a particular tenant, why hath he not an equal power to admit, and an equal right

to his fines, upon the determination of the tenants eſtates in general by the death of the laſt admitting lord? it is very extraordinary to allow it in the one caſe, and not in the other: if a particular tenant dies, his eſtate is determined, and his heir muſt pay a fine to the Duke; yet if the laſt admitting lord dies; all the eſtates of the tenants are determined, and yet the Duke hath no right to a fine.

It hath been objected, that this is multiplying the fines of the tenants, and ſubjecting them to frequent burthens of this kind. But where is the inconveniency to the tenants? they are ſtill to hold during their own lives and the life of the lord who admits them; and that is the very tenure of their eſtates: nay if a leſſee for years, or any other *dominus pro tempore* ſhould admit them, their eſtates would be good, according to theſe admittances, during their own lives and the life of ſuch lord; and the determination of the lord's eſtate would have no influence upon theirs. Indeed if there ſhould appear to be any fraud or contrivance in a ſettlement of this kind, by putting in a number of lives ſucceſſively, on purpoſe to multiply the fines of the tenants; this court would undoubtedly interpoſe in ſuch caſe, and relieve them; but in the preſent caſe nothing of that kind can be pretended.

Theſe are my preſent thoughts upon this queſtion: but as the counſel for the defendants have inſiſted upon having an iſſue tried, I readily agree to it.

And this being agreed to by the counſel for the Duke, an iſſue was directed to be tried at the bar of the court of King's Bench by a jury of *Middleſex*; which iſſue was this, *viz.* whether a general fine was due to the Duke of *Somerſet* from the tenants of the manors of *Cockermouth*, &c. as next admitting lord, upon the death of the Ducheſs of *Somerſet*.

And in the beginning of this term, this iſſue was accordingly tried before *Raymond* Chief Juſtice, Mr. Juſtice *Forteſcue*, and Mr. Juſtice *Reynolds*, (Mr. Juſtice *Powys* being abſent).

Upon the trial three points came in quſtion in relation to evidence.

Lords of cuſtomary manors diſallowed as witneſſes.

1. Whether lords of other cuſtomary manors ſhould be allowed as witneſſes. And it was reſolved, that they ſhould not, becauſe the preſent queſtion concerned the right of lords of ſuch manors, who came in by ſettlement to their fines; and therefore they had a plain intereſt in the event of the cauſe.

2. The

2. The fecond queftion arofe upon this; the plaintiff's counfel offered to give in evidence, that feveral other tenants who hold of the manors in queftion, under the fame tenure as the prefent defendants, had fubmitted and paid their fines to the Duke: and this evidence was oppofed by the counfel of the defendants, who infifted, that what was done by other tenants could not be given in evidence againft them, for they were ftrangers to the defendants, and had fubmitted fince the fuit was commenced. It was faid, that even if a verdict had been recovered againft the other tenants, it could not be given in evidence againft the prefent defendants, much lefs a matter *in pais*, which was fo recent, that it could be of no manner of weight.

It was allowed as evidence againft the defendants, that other tenants had fubmitted, and paid.

To this it was anfwered, that it being a cuftom which was now trying, it was very proper to give in evidence the acts and ufages of the tenants of the fame manors. And the cafe of the city of *London* v. *Clarke* in this court before *Holt* Chief Juftice was cited, where (it was faid) verdicts againft former defendants who were in the like circumftances as the then defendants, were permitted to be given in evidence. So in the cafe of toll, where actions are brought for not paying it, the plaintiff is always allowed to give in evidence payment by others; unlefs it be made appear, that fuch payment was by collufion. So in the cafe of *modus's* this kind of evidence is always allowed.

Carthew. 181.

The court held, that they never knew this kind of evidence denied; and the weight of it, and the recency of the fact, were circumftances entirely proper for the jury: fo the plaintiff was allowed to give the evidence he offered.

3. The third point was the moft material, and that arofe upon the plaintiff's offering to give in evidence feveral inftances of fines being paid in like cafes, to lords of other manors.

Cuftoms of other manors given in evidence.

This was oppofed by the Solicitor General for the defendants, who infifted, that this kind of evidence could not be given; for the cuftom which was now in difpute, was ufed and confined to the manors in queftion; and therefore no cuftom which prevailed in other manors, could be any ways applicable to the particular cuftom now in difpute. Cuftoms are different in different manors, and it would be of the worft confequence, and create the utmoft confuffion, if the cuftom of one manor fhould be allowed in proof to fupport the cuftom of another manor. Cuftoms of particular manors are in their nature diftinct, but if this fort of evidence fhould be allowed, the cuftoms of all manors muft become the fame: in fome

manors heriots are paid, in ſome not; in ſome the fines are certain, in ſome arbitrary; but becauſe a heriot is paid in the manor of *A.* is it therefore any reaſon that a heriot muſt be paid in the manor of *B?* Certainly no; for the cuſtom of one manor can by no means be concluſive upon another manor; becauſe each manor hath its particular cuſtoms, and they have no relation to one another, but by accident. Each manor hath its own cuſtoms, and the validity of thoſe cuſtoms muſt depend upon their own ſtrength, without having any aſſiſtance from the cuſtoms which prevail in other manors.

Serjeant *Wynne* of the ſame ſide ſaid, that it had been the conſtant practice on the northern circuit, where queſtions of this kind frequently aroſe, always to diſallow of this ſort of evidence; and he cited a caſe, in which Mr. Juſtice *Reynolds* ruled it ſo, the laſt aſſizes at *Carliſle*.

Serjeant *Pengelly contra*. The evidence we offer, is in order to ſhew the uniformity of the cuſtoms of theſe kinds of manors in general, throughout the whole county. We do not ſay, that becauſe there is ſuch a cuſtom in one manor, that there muſt therefore neceſſarily be the ſame cuſtom in another; no, we are only attempting to explain the nature and tenure of theſe cuſtomary eſtates, and are going to ſhew, that whereever theſe ſort of eſtates prevail, the lords who have been tenants for life of ſuch manors, have always, without any controverſy, received their general fines: and this muſt certainly be very proper evidence in the preſent queſtion: it will prove, that it is the nature of theſe eſtates in all places where they prevail, to be ſubject to the payment of fines in like caſes, and that it is the undoubted privilege of like lords to be intitled to them. If there ſhould be a queſtion whether a copyhold can be entailed; the party would have liberty to give in evidence the cuſtom of entailing in other manors. But I hope the court will have no difficulty in allowing this ſort of evidence, ſince this very queſtion hath been already determined upon a ſolemn trial at bar between *Chapman* and *Atkinſon*, *Mich.* 24 *Car.* 2. *B. R.* 3 *Keb.* 90. where the queſtion was, whether a general fine was due to an infant ſucceeding lord, during his minority; and upon the trial of this iſſue, the defendants gave in evidence, that other manors adjoining had the ſame cuſtom not to pay to the lord till he was of full age; and the book ſays, that the court held this evidence to be good.

Attorney General of the ſame ſide. The preſent queſtion concerns the nature of cuſtomary eſtates in general, and this is a tenure by which the greateſt part of the eſtates in the north-

ern

ern counties are held: it is not the cuftom of thefe particular manors, which the prefent queftion is confined to, but the queftion relates to thefe eftates in general, and therefore it is very proper to examine into the tenure and nature of thefe eftates in all other places where they prevail. The iffue which is to be tried is not whether there is fuch a cuftom in thefe particular manors, but whether the Duke of *Somerfet*, as next admitting lord, hath a right to thefe fines; fo that the right is the thing in queftion, and to prove that he hath a right, we are going to fhew, that it is the nature of thefe eftates to be fubject to a general fine in fuch cafes. If any difpute fhould arife about *Gavelkind* lands which lie out of the county of *Kent*, (as fome lands of that tenure do) can it be pretended, that the party would not be admitted in that cafe, to examine into the cuftom of *Gavelkind* in general? And it is no more that we contend for in the prefent cafe; we only defire that we may give evidence of what is the general cuftom of tenant-right eftates.

Lutwyche of the fame fide. I have gone the northern circuit many years, and I have always obferved it to be the practice, to allow this fort of evidence (and in this *Bootle* and *Fazakerley* who had gone the fame circuit many years, and were of counfel with the Duke, agreed with him.) He cited the cafe of *Relf*, which was tried fome years ago at *Carlifle*, and was thus: *A.* was lord of a manor, and was the laft general admitting lord, and fold the manor to *B.* afterwards *C.* one of the cuftomary tenants of the faid manor died, and *B.* admitted his heir; then *A.* who was the laft general admitting lord, died; and *B.* demanded a fine of the heir of *C.* and upon the heir's refufing to pay it, *B.* brought his action againft him to recover it; and upon the trial *B.* was permitted to give evidence of what was the cuftom of other manors throughout the county.

Raymond Chief Juftice. I have always looked upon it as a fettled principle in the law, that the cuftoms of one manor fhall not be given in evidence to explain the cuftom of another manor; for if this kind of evidence fhould be allowed, the confequence feems to be, that it would let in the cuftom of one manor into another, and in time bring the cuftoms of all manors to be the fame. I fhould readily admit that this evidence might be allowed, if the cuftoms of tenant-right eftates were the fame in all manors; but it is plain that the cuftoms of thefe eftates are different in different manors: for thefe reafons I am inclined, in my own private opinion, to difallow the evidence, which is now offered: but upon the authority of the cafe in *Keble*, and upon the credit of the gentlemen who go the northern circuit, and affirm that it has been the conftant

practice to allow this kind of evidence there, I must submit; though against my own opinion.

Fortescue Justice. I think the evidence which is offered ought to be allowed; there is a great difference betwixt the *custom* of a manor, and the *tenure* of a manor; and the question which we are now trying merely concerns the *tenure* of the plaintiff's manors; therefore it is very proper to enquire, what are the qualities which attend other estates, which are held by the same *tenure*. And it must give great satisfaction to those who are to try the present question, to know how far this quality of paying fines in like cases, has attended the like tenure in other manors. I think the case in *Keble* is a plain authority, and we must follow precedents.

Reynolds Justice. I have been always of opinion, that the customs of one manor could not be made use of to influence the customs of another. And so it has always been held in cases where the dispute is concerning the intailing of a copyhold; where the customs of adjoining manors are never allowed, as evidence to support the custom of the particular manor in question. But upon the authority of the case which has been cited, and upon what has been affirmed by the gentlemen at the bar, I submit that the evidence that is offered shall be allowed, though it is contrary to the notion I have always had of the rules of evidence.

N. B. It was intended to send down to *C. B.* for their opinions, but they were up; however, upon putting the case to them and the Barons of the Exchequer, they were all of opinion (as Judge *Denton* told me) that the evidence of other manors should not have been allowed, and said they had never known it.

Upon this, the plaintiff proceeded to give evidence of the customs of other manors.

And after a long examination of witnesses in relation to the customs, and what had happened in other manors, *viz.* that tenants in dower, jointuresses, and tenants for life by settlements, had had general fines paid to them by their tenants; the jury, by the direction of the court, brought in a verdict for the plaintiff the Duke of *Somerset*.

And at the end of this term, the cause came on again before the Lord Chancellor, who decreed the tenants to pay their fines, and gave the Duke his costs.

Dominus

Dominus Rex *versus* Collingburne.

A. is bound apprentice to *B.* who is a freeman of the city of *London*, and *A.* is bound and inrolled there, then goes and lives with his master in *Middlesex*. The justices of the peace for the county may discharge him. L. Raym. 1410. Seff. Caf. 285.

THIS was an order of feffions made at *Hicks's Hall*, for the difcharge of an apprentice to a freeman of the city of *London*, and who was bound and inrolled there: and the order being removed hither, there were thefe exceptions taken to it.

1. That the apprentice was bound and inrolled in *London*. 2. Not bound by the juftices. 3. Not a trade within the ftatute, he being a glafier.

To thefe exceptions it was anfwered, that the claufe of the ftatute 5 *Eliz. c.* 4. § 35. enacts, "That if any mafter fhall "mifufe his apprentice, he fhall repair unto one juftice of the "peace where he dwelleth, &c. And § 40. provides, "That "the cuftoms of *London* and *Norwich* fhall be faved." *Sect.* 35. has always received a large conftruction in favour of the jurifdiction of juftices, for though upon the mafter's complaint no power is given to the juftices to difcharge, yet in 21 *Car.* 2. 1 *Saund.* 313. 1 *Vent.* 175. *Hawkefworth* and *Hillarie*'s cafe, it is held, that it was reafonable, and within the intent of the ftatute, that an apprentice fhould be difcharged from an ill mafter, as well as a mafter fhould be difcharged from an ill apprentice; and in 1 *Mod. Wilkins* v. *Edwards*, there is the fame point, and in 1 *Vent.* 174.

1. The firft and principal queftion is, whether the court of feffions at *Hicks's Hall* have any jurifdiction to difcharge an apprentice to a freeman of *London*; or whether he is not to be difcharged only by the mayor's court. It is found that the apprentice lived with his mafter out of the city of *London*, and within the jurifdiction of the juftices of *Middlefex*.

To this exception it was anfwered, that the ftatute does not regard where the binding or inrolling is, but gives the jurifdiction exprefly to the juftices of peace where the mafter lives; and if this did not belong to the juftices of *Middlefex*, where the mafter lives, there would be a failure of juftice; for neither the chamberlain, or any other city magiftrate, have power to compel the mafter's appearance before them.

To the fecond exception it was faid, that it was immaterial where the apprentice was bound, for the fame reafon.

3. And to the third exception it was faid, that formerly indeed it was a doubt, whether the ftatute did extend to all trades; but of late it hath been fettled and agreed, that it does. *Salk.* 471. *Palm* 526. 2 *Keb.* 822. *Rex* v. *Taunton*, *Hil.* 6 *Geo.*

 The

The court affirmed the order of discharge, and said they would not take away the jurisdiction of the mayor's court, but only give a concurrent jurisdiction to the justices of the peace for the county. And it would be very inconvenient, to have apprentices to a freeman of *London*, who are bound there, and who live in distant countries, obliged to come up to the mayor's court to get themselves discharged: and the words of the statute are very plain; for they give the jurisdiction to the justices where the apprentice lives.

7 An. c. 20.

Cheval *versus* Nichols. In Scaccario.

Annuity granted out of lands lying in *Middlesex*; *A.* hath notice of this grant, and then purchases the inheritance of the lands; the grantee shall have his annuity against *A.* tho' his grant was not registered. 2 Eq. Caf. Abr. 63, pl. 7.

ONE *John Hall* was possessed of a term for years in certain lands lying in the county of *Middlesex*, and granted an annuity of 40*l.* to the plaintiff, to be issuing out of the lands. The defendant being concerned for this *Hall* in the management of some of his affairs, knew that *Hall* had granted this annuity to the plaintiff, and had seen the deed, and paid him part of the annuity upon *Hall's* account: afterwards *Hall* purchases the reversion of these lands, and then the defendant purchases the term and the reversion of *Hall*. *Hall* dies, and the defendant refused to pay the plaintiff his annuity, because the deed by which *Hall* had granted it was not registered according to the statute 7 *Ann*. c. 20. which requires that all deeds or conveyances of, and all incumbrances upon, lands lying in the county of *Middlesex*, shall be registered within such a time at the office; otherwise every such conveyance shall be void against any subsequent purchaser for a valuable consideration. The defendant therefore insisted that he was a subsequent purchaser for a valuable consideration, and that the plaintiff's claim of an annuity could not affect him, because it was not registered.

The whole court were clearly of opinion, that the plaintiff was intitled to have his annuity out of these lands against the defendant, notwithstanding this statute. For the statute only intended to give such notice of former incumbrances to purchasers, that they might not thereby be defrauded; but if a man knows of his own knowledge, that there is a prior incumbrance, and notwithstanding that knowledge will be a purchaser, the statute was never intended to relieve such, though the first incumbrance was not registered. For where a man purchases with notice of a prior incumbrance, he purchases with an ill conscience; and in a court of equity his purchase shall never be established.

Therefore they decreed the plaintiff his annuity and the arrears.

Buckley

Buckley *versus* Nightingale. In C. B.

An heir hath lands by hereditary descent, yet he shall not be liable for the debt of his ancestor any further than to the value of the lands descended.

THE plaintiff as administrator of the goods and chattels of *Joan Terry* widow deceased, which were unadministred by *John Terry* deceased, who was the executor of the said *Joan*, brought an action of debt against the defendant as son and heir of *Matthew Nightingale* deceased, upon a bond executed by the said *Matthew* the father, for the payment of 200*l.* to the said *Joan*. The defendant pleads, and admits that he is son and heir of the said *Matthew* (the obligor), but says that the said obligor his father in his life-time was seised of a messuage or tenement called *Pryors*, and in consideration of the sum of 300*l.* demised the same to *J. S.* for ninety-nine years, reserving only a pepper-corn yearly rent; and that the said defendant hath not any lands or tenements by hereditary descent, nor had he *ad diem impetrationis brevis originalis praed'*, or at any time after, except the reversion of the said messuage and tenement, and one messuage and three roods of land in *R.* being together of the value of 300*l.* and no more: and then he sets forth, that the obligor his father, in his life-time, before his entering into the said bond upon which this action was brought, did become bound to one *Thomas Poole* in 120*l.* which last bond at the time of his death was in full force and undischarged; and then goes on and sets forth in like manner three other bonds, each for the sum of 200*l.* in which his said father was bound to three other persons; and shews that he died and left the said bonds standing against him in full force and virtue: then the defendant says, that long *ante impetrationem brevis originalis praed'* of the plaintiff, *viz.* upon the first of *June* 1720, he, the defendant, agreed with the several persons aforesaid to whom his father was bound, to pay them the several sums aforesaid, which in the whole amounted to 600*l.* which he avers is more than the value of the said messuage and tenement and lands in *R.* and the reversion; *et petit judicium si ipse ut filius et haeres ipsius Matthei patris de debito praed' virtute scripti praed' onerari debeat, &c.* and then avers that the said *Joan Terry* in her life-time refused to accept in satisfaction of her said debt, her proportion of the said sum from the defendant together with the rest of the said creditors. To this plea the plaintiff demurred,

And upon argument the whole court were of opinion, that the defendant's plea was good; for though it was the defendant's debt because his ancestor had bound him, yet he is liable no further than to the value of the land descended; and as soon as he has paid his ancestor's debts to the value of the land, he shall hold the land discharged. Otherwise he might be

be chargeable *ad infinitum.* The cafes which are cited in the argument were 20 *H.* 7. 5. 6. *Keilw.* 62, 63, 64. 26 *H.* 8. 1. *Plow.* 440.

Browning *verfus* Newman.

At Guildhall, coram Raymond *C. J.* de. B R.

Cafe *for words* by which he loft the cuftom of *J. S.* and feveral others; the plaintiff fhall only be admitted to prove the lofs of *J. S.*'s cuftom particularly.

THIS was an action upon the cafe for thefe words; "You are a thief, and I will prove you fo." The plaintiff declared that by reafon of the defendant's fpeaking them, one *John Merry* and divers others, who were his cuftomers, left off dealing with him in his trade.

Upon the trial the plaintiff proved the fpeaking the words, and the fpecial damage as to *Merry*; and would have gone on to prove by feveral others, that they had likewife left off dealing with him by reafon of the defendant's fpeaking thefe words.

But the defendant oppofed this; becaufe (as he infifted) he could not be fuppofed to be prepared to anfwer fuch uncertain kind of evidence.

The Chief Juftice faid, That in actions for words which are not in themfelves actionable, and where the fpecial damage is the *git* of the action, this fort of evidence is allowed, though the particular inftances of fuch damages are not fpecified in the declaration: but in actions for words which are in themfelves actionable, (as the prefent words are) particular inftances of fpecial damage fhall not be given in evidence, unlefs particularized in the declaration. And therefore he thought the plaintiff could not be allowed to give particular inftances of the lofs of any other cuftomer, except *Merry*. He faid that he had known it ruled otherwife; but that this was his opinion; however he admitted the plaintiff to give general evidence of the lofs of cuftomers.

But he may give general evidence of the lofs of cuftomers.

Marriot *verfus* Marriot. In Scaccario.

After probate of the will a court of equity may inquire into the fairnefs of a refiduary devife of perfonal eftate. Gilb. Rep. 203.

MARRIOT, Mafter of the Exchequer of pleas made his will, and left his wife executrix and refiduary legatee. His fons were plaintiffs in this cafe, and contended, that this devife of the *refiduum* was gotten by fraudulent means, and by furprize. The wife produced the probate of the will; and the counfel in behalf of the wife the defendant contended, that the

the probate of the will was conclusive evidence touching this disposition of the *residuum*, and that a court of equity could not look into the same, but that it was merely of ecclesiastical jurisdiction, and to be determined there.

And in this question four things were considered by the court. *First*, How the jurisdiction of testamentary matters stood by the civil law.

The way of authenticating wills in the civil law was first before the *praetor*, and afterwards before the *magister census*, for they reckoned wills to be in the nature of judgments or decisions that a man himself made touching his estate. And therefore they were shut up with the magistrate during the life of the person, for the quiet and repose of the family, but were opened after his decease. They were signed by the testator, and sealed by him, and by the witnesses, upon a thread, and carried in to the *praetor*: after the death of the party the witnesses were called if living, to acknowledge their seals; if they were not living, then the seals were broke, and the will opened, in the presence of other sufficient witnesses; and the will was read and registered, and a copy of it delivered over to any person that would ask for the same. For it was reckoned as a matter of record, and therefore any person might have access to it. For this see *Digest*, *lib.* 28. *tit.* 1. *Qui testamenta facere possunt, et quemadmodum testamenta fiant*: and *Cod. lib.* 6. *tit.* 32. *Quemadmodum testamenta aperiantur*, &c. When any legacy was disposed of to pious uses for the use of the church, or for monasteries, or for the poor, the bishops were to sue for the same, and see to the administration thereof. This appears by the *Code*, *lib.* 1. *tit.* 3. *leg.* 42. § 6. *necessarium.* § 7. § 8. and § 9.

Tract. Tractatuum, to. 1. fol. 38. b. n. 8.

Tract. Tractatuum, to 14. fo. 200. n. 89.

Upon this the bishop began to intermeddle with the probate of wills, which was a temporal authority. But this *Justinian* would not endure, and therefore in his *Code* he puts the law against the bishop's probate of wills before the laws herein before mentioned: and it is afterwards said, *eodem tit. leg.* 41. *Repetita promulgatione, non solum judices quorumlibet tribunalium, verum etiam defensores ecclesiarum hujus almae urbis, quos turpissimum infinitandi ultimas deficientium voluntates genus irrepserat, praemonendos esse censemus, ne rem attingant, quae nemini prorsus omnium, secundum constitutionum praecepta, praeterquam magistro census, competit; absurdum etenim clericis est, immo etiam opprobriosum, si peritos se velint [ostendere] disceptationum esse forensium: temeratoribus hujus sanctionis poena quinquaginta librarum auri feriendis: datum* XIII. *Kal. Dec. C. P. Justiniano A.* II. *et Opiliano* Coss. DXXIIII. Thus things stood by the civil law.

We

We now come, in the second place, to consider how things stood by the canon law. The popes, as their power increased, endeavoured to get the jurisdiction over testaments; and this appears by the decretal, *lib.* 3. *tit.* 26. *c.* 6. *Si haeredes jussa testatoris non adimpleverint, ab episcopo loci illius omnis res quae eis relicta est canonice interdicatur, cum fructibus et caeteris emolumentis, ut vota defuncti adimpleantur.* And likewise *Decret. lib.* 3. *tit.* 26. *de testamentis, c.* 17. *Tua nobis fraternitas intimavit, quod nonnulli tam religiosi quam clerici seculares, aut laici, pecuniam et alia bona quae per manus eorum ex testamentis decedentium debent in usus pios expendi, non dubitant aliis usibus applicare; cum igitur in omnibus piis voluntatibus sit per locorum episcopos providendum, ut secundum defuncti voluntatem universa procedant, licet etiam a testatoribus id contingeret interdici: mandamus quatenus executores testamentorum hujusmodi, ut bona ipsa fideliter et plenarie in usus praedictos expendant, monitione praemissa, compellas.*

Tract. Tractatuum, to 14. fo. 199. n. 88.

Pope *Innocent* the fourth upon this law, *fol.* 152. says, that the bishop may dispense this charity, if there be no executor appointed by the will, and if there be an executor and he does not fulfil the will, that then he may take it to himself. *Decret. lib.* 3. *de testamentis, tit.* 26. *c.* 19. *Johannes clericus et P. laicus executores ultimae voluntatis O. clerici sanctae crucis, qui venerabilibus et piis locis de bonis suis in ultima voluntate legavit, mandans insuper satisfieri creditoribus per eosdem, post mandatum susceptum per dioecesanum cogi debent testatoris explere ultimam voluntatem. Vide Innocent. in legem* 153.

Pan. to 4. fo. 157. *Panormitan* upon the law, *Si haeredes*, says, that this matter of wills, even where the devise is to pious uses, is *mixti fori*, and that the heir or executor is to have a year's time to fulfil the will, before he can be compelled to it by ecclesiastical censure.

Pan to 4. fo. 176. Upon the law, *Tua nobis*, *Panormitan* says, that the bishop is to compel by ecclesiastical censure the executor to perform the will to pious uses, although the will itself says, that the bishop was not to intermeddle: for they look upon that as an irrational part of the devise, which is in itself void.

Pan. to 4. fo. 179, 180. The last chapter, *verbo Johannes*; The case as *Panormitan* states it was, where after debts paid the residue was left to pious uses, and there the bishop was to compel the payment of debts, and afterwards to see the disposition of the *residuum*. I do not find that any of the canonists pretend, that wills are of ecclesiastical cognizance *sua natura*, but only such wills as were made for pious uses.

Lyndwood,

Lyndwood, fo. 174. *verbo Approbatis* says, that jurisdiction of the ecclesiastical courts touching testamentary matters is by the custom of *England*, and not by the ecclesiastical law.

We are thirdly to consider upon what foot the ecclesiastical jurisdiction stood by the law of *England*. In *England* the bishop and sheriff sat together in the county court, as it appears by the laws of king *Edgar, cap.* 5. *de comitiis. Centuriae comitiis quisque (ut ante praescribitur) intersto: oppidana ter quotannis habeantur comitia: celiberrimus autem ex omni satrapia bis quotannis conventus agatur, cui quidem illius diocesis episcopus et senator intersunto, quorum alter jura divina, alter humana populo edoceto. Leges Canut. c.* 17. *de comitiis municipalibus. Et ter in anno habeantur comitia municipalia, et duo conventus provinciales, aut plures etiam, et illis intersit episcopus ac senator, et ibi ubique doceatur tam jus divinum quam humanum.* Wilkins 78. Lamb. Saxon Laws 69.

From these laws it plainly appears that the probate of testaments was in the county courts. *William* the conqueror was the first that separated the ecclesiastical court from the civil. *Selden* in his notes upon *Eadmerus* 167. gives us the very charter of such separation. *Propterea mando et regia authoritate praecipio, ut nullus episcopus vel archidiaconus de legibus episcopalibus amplius in hundred. placita teneat: nec causam quae ad regimen animarum pertinet, ad judicium secularium hominum adducant.* This charter, as Mr. *Selden* has told us, was recited in a close roll of *Richard* the second, and then confirmed: but the charter of *William* the first does not mention matters testamentary, or the probate of wills, to be of ecclesiastical cognizance. It only says, that the crimes that were to be prosecuted *pro salute animae*, were to be of that cognizance.

That which seems first to have given birth to the ecclesiastical jurisdiction, was the charter of *Henry* the first: which says, *Si quis baronum vel hominum meorum infirmabitur, sicut ipse debet vel dare dispofuerit pecuniam suam, ita datum esse concedo, quod si ipse praeventus vel armis vel infirmitate pecuniam suam nec dederit nec dare dispofuerit, uxor sua, sive liberi aut parentes et legitimi homines sui, pro anima ejus eam dividant.* This let in the several canons before mentioned into *England:* for since the personal estate was to be disposed of for the soul, they looked upon every will to be a disposition of the testator in a gratuitous or charitable manner: that whatever was left, was to be disposed of by the executor for the good of the soul: so that all the canons touching charitable dispositions were to take place in *England.* Mat. Paris, fol. 56.

In

In the time of *Richard* the firſt, when he was in confinement, the clergy got a confirmation from him of the eccleſiaſtical immunities: this is mentioned by *Mat. Paris* 161. *Item diſtributio rerum quae in teſtamento relinquuntur authoritate eccleſiae fiet, nec decima pars ut olim ſubtrahetur: ſi quis enim ſubitanea morte vel quolibet caſu praeoccupatus fuerit, ut de rebus ſuis diſponere non poſſit, diſtributio bonorum ejus eccleſiaſtica authoritate fiet.* This charter is likewiſe mentioned in the ſame terms in *Radolphus de Diceto*, one of the *Decem ſcriptores F.* 658. And theſe eccleſiaſtical immunities were confirmed by the pope, and the confirmation appears in 1 *Vol. Foedera* 104. though there is no expreſs mention of a teſtamentary juriſdiction. *Note* alſo it appears by the charter, that the King releaſes the tenth, that uſed to be taken on the death of the tenant; and henceforward the King and his Lords only took heriots as an acknowledgment in lieu of ſuch decimation.

From henceforth the eccleſiaſtical court began to conſider a proper method for the publication of wills; therefore when any perſon died, they ſummoned in the executor or next relation to take care of his ſoul, and the executor was obliged to bring in the will. And both executor and adminiſtrator were obliged to bring in an inventory of his goods, and the charges were heightened, by the canons, in order to bring every thing into the eccleſiaſtical court: *Lyndw.* 176. *Canon* of *Simon Mepham.* And it appears by the canon of *Stratford*, that the reſidue in the hands of the executor was to be diſtributed for the good of the ſoul. *Lyndw.* 178. And by the canon of *Otobon* an inventory was to be exhibited. *Lyndw.* 107.

Notwithſtanding all this the juriſdiction of the county courts ſtill continued, for this was acknowledged to be a matter *mixti fori*, and therefore they could not hinder the county court from proceeding, even according to their own canon law. But in order to get the whole juriſdiction, in the time of *Richard* the ſecond, as is mentioned by *Selden* in his notes on *Eadmerus*, they got the right to publiſh the law of *William* the conqueror, and confirm the ſame; that no matters of eccleſiaſtical cognizance ſhould be tranſacted in the county courts. This is in the charter of 2 *R.* 2. *Membran.* 12. n. 5. and is mentioned in *Selden's Eadmerus* 168.

From henceforward the clergy had the whole juriſdiction of wills, becauſe the county court could not receive the probate, and the King's court had never intermeddled with it; for by the charter of *Rich.* 1. herein before mentioned, and likewiſe by *Magna charta, cap.* 18. the King had granted the liberty to his own tenants, to diſpoſe of their goods, and there-

therefore the will touching perfonal eftate never received any fanction in the immediate court of the King.

This reconciles that cafe in *Fitzherbert's Abridgment*, tit. *Teftament*, fol. 148. faid by *Fairfax*, that it was but of late, that the church had the probate of wills, which was by an act, I fuppofe he muft mean the confirmation, of *Ric.* 2. before mentioned, for there is no act of Parliament that gives them that probate. And he fays, that in other countries the probate was of temporal cognizance, which *Selden* notes to be true in all countries, except *France*. And *Tremaile* in that cafe afferts the ufage of proving wills in courts-baron, which certainly may be where the cuftom prevails.

In 11 *H.* 7. 12. *Fineux* afferts, that the probate of wills did not belong to the fpiritual court by the ecclefiaftical law, but came to them by cuftom and ufage only: and thefe are the foundations on which my Lord *Coke* in *Henfloe*'s cafe, 9 *Rep. fol.* 38. concludes, that when the will is proved in the ecclefiaftical court, that court has executed its authority; but the executors are to fue in the temporal courts, to get in the eftate of the deceafed.

Fourthly, we are to fee what have been the feveral diftinctions in our law touching this jurifdiction, which will fall under five heads.

1. That the fpiritual court is the only court now, that has authority to receive the probate of wills, and to give a fanction to them; becaufe the jurifdiction of the county court is loft by non-ufage; and fince *Magna charta*, *cap.* 18. the King's courts did intermeddle with the goods of a deceafed tenant. But here muft be excepted all courts-baron that have had probate of wills time out of mind, and have always continued that ufage.

2. The feal of the ecclefiaftical court does authenticate the will, for there the will is to be brought in and proved. And therefore the cafe in *Raymond* 406, 407. is certainly good law, that the feal of the ordinary cannot be contradicted, becaufe if there be no way in the temporal courts to prove the will relating to chattels, it muft go on in the fpiritual court, and the determination muft there be final: for the temporal court cannot make a judgment concerning the will contrary to what was made in the ecclefiaftical court; and therefore it is certainly good law, that if they fhew a probate under the feal of the ordinary, they cannot give in evidence that the will was forged, or that the teftator was *non compos mentis*, or that another perfon was executor; but they may give in evidence that the feal was forged, or that there were *bona notibilia*, becaufe that is

2 Roll. Abr. 299.

is not in contradiction to the real seal of the courts; but it admits the seal, and avoids it. 1 *Lev.* 235. *Vaughan* 207. 1 *Shower* 293. And since the ecclesiastical court has the probate of wills now settled by custom, the temporal court cannot prohibit them in their inquiries whether the testator was *compos mentis* or not, or whether the will be revoked or not, because that is necessary for authenticating the will. *Hardr.* 131, 313.

3. If a temporal matter be pleaded in bar of an ecclesiastical demand, they must proceed in the ecclesiastical court according to the temporal law, or else the temporal courts will prohibit. As if payment be pleaded in bar of a legacy, and there is but one witness, which the ecclesiastical court will not admit; there the temporal courts will prohibit them, because it is a matter temporal that bars the ecclesiastical demand. *Shutter et ux'* v. *Friend*, 1 *Show.* 158, 173. 1 *Vent.* 291. 3 *Mod.* 283. But if upon the probate of the will they allege on the other side, that the will was revoked, and they would prove the revocation by one witness, according to the resolution in *Yelverton* in the case of *Brown* v. *Wentworth*, *fol.* 92, 93. they might be prohibited from granting the probate; but that resolution, which was only of three Judges against two, and seems against the opinion of *Rolle*, 2 *Abr.* 299. seems to intrench upon their jurisdiction; for if they cannot judge by their law, whether the will is revoked or not, they cannot judge whether there is a will or no will: indeed the judges there say, that the revocation is a temporal matter, and therefore it is to be proved according to their law, by one witness; but then they will not be suffered to determine touching the validity of a will of personal estate, which every body allows to be of ecclesiastical cognizance. But if the spiritual court do admit a will, and yet will not give the probate out to an executor, because he cannot give security for a just administration, it seems that a *mandamus* will lie. And this was resolved in the case of *The King* v. *Sir Richard Raines*, *Mich.* 10 *W.* 3. *in B. R.* For though they are to determine, whether there be a will or no will, yet if there be a will, the executor has a temporal right, and they cannot put any terms upon him but what are mentioned in the will; and therefore if they will not grant the probate, where they admit there is an executor, the court will grant a *mandamus*.

Salk. 299.

4. If a man gives lands to be sold for the payment of debts, and disposes of the money to several persons; that cannot be sued for in an ecclesiastical court, but only in a court of equity, because that is not a legacy merely of goods and chattels, but it arises originally out of lands and tenements, and they have a testamentary jurisdiction touching chattels only. *Hob.* 365. *case* 345. 2 *Rol. Abr.* 285.

5. The

5. The courts of equity can hold plea concerning a legacy, and likewife concerning the devife of the *refiduum*, which is but a legacy. They may in notorious cafes declare a legatee, that has obtained a legacy by fraud, to be a truftee for another: as if the drawer of a will fhould infert his own name inftead of the name of a legatee, no doubt he would be a truftee for the real legatee. As to the devife of the *refiduum*, nothing can be more clear: for fince the cafe of *Fofter* v. *Monk*, where- 1 Vern. 473. ever an executor had a fpecifick legacy, he was looked upon as a truftee for the relations in a courfe of diftribution: and no body ever attacked thefe refolutions upon this head of argument, that they were contrary to the ecclefiaftical jurifdiction. But in all fuch cafes a court of equity muft confider what is the real will of the teftator, and they cannot declare a truft according to their own fancy, nor according to what the teftator fhould have willed, for then they make the will, and not the teftator. But they may, to anfwer the real intention of the teftator, declare a truft upon fuch will, though it be not contained in the will itfelf; which is in thefe three cafes. 1. In that of fraud upon a legatary before mentioned. 2. Where the words imply a truft for the relations, as in the cafe of a fpecifick devife to executors, and no difpofition of the *refiduum*. 3. In the cafe of the legatee promifing the teftator to ftand as a truftee for another. And no body has thought, that declaring a truft in any of thofe cafes is an infringement of the ecclefiaftical jurifdiction.

The court being thus of opinion, that they had a power to relieve againft the devife of the *refiduum*, they directed proper iffues to try the matters of fraud and furprize infifted on by the plaintiffs, againft which decree the defendant brought an appeal, but before any thing further was done upon it, the plaintiffs and defendant agreed to divide the *refiduum* between them.

Jefferies *versus* Austin.

In Middlesex, coram Eyre, *C. J.* de C. B.

Consideration of a promissory note inquired into.

IN an action upon the case upon a promissory note brought by the person to whom it was payable, the Chief Justice let the defendant in, to shew that it was delivered in the nature of an escrow, *viz.* as a reward, in case he procured the defendant to be restored to an office; which it being proved he did not effect, there was a verdict for the defendant.

Dominus Rex *versus* Major de Canterbury.

Where an officer is at pleasure, the choice of another is a determination.

ON a *mandamus* to restore a recorder, they returned that he was only an officer at pleasure, and that upon due summons to chuse another, they did chuse another, *et per inde* the former was removed.

It was objected, that this was only argumentative, and that returns to writs of *mandamus* must be certain to every intent. *Et per cur'*, That is good general doctrine, but not applicable to this case. They needed not say any thing of his being removed, because the chusing another is a determination of their will, which is enough for them to shew.

Adjournatur. And at another day the Solicitor general objected, that the summons was only to elect a new recorder: and many a man, who would have appeared, had the summons been to remove, might absent himself when it was only to chuse a new one. *Et per cur'*, We must presume people know the effect and consequence of their own acts, that in the case of an officer at pleasure a new election is an actual amotion. 1 *Vent.* 342.

Pleading letters patent *sub sigillo* without *sigillat'* is well.

Then it was objected, that the letters patents are only said to be granted *sub magno sigillo Angliae*, without *sigillat'*. *Sed per cur'*, The word *sub* imports it; the other would be but a repetition. The return was allowed.

Wannel

Wannel *versus* Camerar' Civit' London.

MANDAMUS to admit *George Wannel* to his freedom of the city of *London*: setting forth that he was bound apprentice to one *Samuel Vanreyven* of *London*, merchant-taylor, for seven years; that he had served out his time, and been admitted into the merchant-taylors company, and in due form presented to the chamberlain, who refused to admit him to his freedom.

By-law to oblige a joiner in *London* to be free of the joiners company, good. 8 Mod. 267.

The chamberlain returns, that *London* has time out of mind been a corporation, and consists of several societies, gilds and fraternities of freemen of the city; and that no person could ever be a freeman of the city, till he was a member of one of those fraternities. That time out of mind there has been a company called the joiners company. Then he returns a power to make by-laws, and that 19 *October* 6 *W. & M.* a by-law was made, reciting that several persons not free of the joiners company had exercised the trade of a joiner, in an unskilful and fraudulent manner, which could not be redressed whilst such persons were not under the orders and regulations of the company; therefore it enacts that no person shall use that trade, who is not free of the company, under the penalty of 10 *l.* That the plaintiff did exercise the trade of a joiner; and that at the time of his being presented to the chamberlain he was not free of the joiners company; and therefore he does not admit him to the freedom of the city.

Upon this return, the question was, whether this by-law, to oblige a member of one company to be admitted into another company, was good or not. And to prove it naught, the case of *Robinson* v. *Groscourt*, 5 *Mod.* 104. was relied on, where a by-law to oblige all persons using musick and dancing, to be free of the company of musicians, was held void: and even there it did not appear that the person was free of any other company, as it does in this case.

On the other hand, it was said, that this was a very reasonable by-law; since it tended to prevent frauds in trade. And of that opinion was the court; it being properest for such a person to be under the regulation of that company who understood the trade best. That the case of *Robinson* v. *Groscourt* was adjudged upon the foot of a dancing-master's not being a trader. And there was no inconvenience to an honest man, in being free of this company rather than another.

* Sir *John Pratt*.

But the Chief * Juftice ftarted a difficulty, whether the plaintiff having ferved a merchant-taylor, could oblige the joiners company to admit him, it not being fo ftated in the return; and without that be taken for granted, the by-law will be void. To which it was anfwered by *Fortefcue* Juftice, That the impofing the penalty of 10 *l.* for not taking up his freedom, is the ftrongeft implication that they are bound to grant it. *Per cur' ulterius concilium.*

It was argued a fecond time in laft *Trinity* term by Mr. *Reeve* and the Solicitor General, much to the effect of the former argument. And now this term *Raymond* Chief Juftice delivered the refolution of the court.

Yet fee *Bur.* Rep. 12. and 3 Bur. Rep. 1322, S. P. fettled accordingly.

We are all of opinion, that this is a good by-law, being made in regulation of trade, and to prevent fraud and unfkilfulnefs; of which none but a company that exercife the fame trade can be judges. This does not take away his right to his freedom, but only his election of what company he fhall be free; it is only to direct him to go to the proper company.

As to the objection, that it does not appear the joiners company are bound to admit him; we are all of opinion, that it being faid he *fhall* take up his freedom in that company, under the penalty of 10 *l.* he will be intitled to have a *mandamus*, to prevent a forfeiture. *Per curiam*, The return muft be allowed.

Hilary

Hilary Term

12 Georgii Regis. In B. R.

Sir Robert Raymond, *Knt. Lord Chief Justice.*
Sir Littleton Powys, *Knt.*
Sir John Fortescue Aland, *Knt.* } *Justices.*
James Reynolds, *Esq;*
Sir Philip Yorke, *Knt. Attorney General.*
Sir Clement Wearg, *Knt. Solicitor General.*

Dominus Rex *versus* Williams Major' de Helstone.

THE defendant was elected a corporator eight years ago, and an entry was made in the corporation books of his taking the oath of office, and the oaths of allegiance and supremacy: it was now moved for an information in nature of a *quo warranto* upon the affidavit of the town clerk, who swore, that he did not administer the oath of allegiance, though he made the entry in the manner it appeared to be. But the court would do nothing in it, after so long an acquiescence; and said it would be of dangerous consequence, to allow a town clerk to disqualify members by his own oath, contrary to the record.

Where there is an entry of administring oaths, there must be a recent prosecution if the fact be false.

Dominus Rex *versus* Allington Recorder of Hertford.

If a justice convicts without summons, there shall go an information. Seff. Caf. 353. L. Raym. 1407. Ante, 630.

THERE being affidavit made, that no fummons was had in the cafe of the *King* and *Venables*, the court granted an information againft the juftice who made the conviction.

Cafe of the Prifon of the King's Bench.

Rules of the prifon enlarged till prifon repaired.

THE prifon being in a ruinous condition, and the late rains having broke in, there was an order made for the proprietors to attend the court; and upon their attendance the court was moved to enlarge the rules of the prifon, fo as to take in the *Marfhalfea*, that the prifoners might be removed thither. But the court would do nothing in it, till there was an undertaking by rule of court to put the prifon in repair, which they faid the proprietors were obliged to do, upon pain of forfeiting their right. Whereupon the proprietors fubmitted to a rule, and the rules were enlarged accordingly.

Between the Parifhes of Kinver *and* Stone in com' Stafford.

Renting a coney warren is a fettlement. Salk. 536. 2 Seff. Caf. 114.

UPON a fpecial order of feffions, it was ftated, that a poor perfon rented a coney warren and a cottage upon it at 10 *l. per ann.* which the juftices were of opinion did not gain him a fettlement within the ftatute of *Car.* 2. *Sed per curiam*, A mill has been held to be a tenement within that ftatute, and why not this? It is his ability to pay 10 *l. per ann.* that is the foundation of the fettlement, and whether he pays it for a houfe for habitation, or for a warren which brings him in a profit, is not material: the order of feffions muft be quafhed.

Harrifon *verfus* Winchcombe.

Plead double.

STRANGE moved for leave to plead *non affumpfit*, and *non affumpfit infra fex annos*, and cited *Falkes* v. *Smith in C. B. Mich.* 12 *Geo.* where there was the like rule; and in the principal cafe it was ordered accordingly.

Mich. 13 *Geo. Briftow* v. *Woodward* granted again on my motion. *Eodem termino Toephen* v. *Elking* the fame rule.

Dominus

Dominus Rex *versus* Buck.

STRANGE moved to quash an indictment for killing a hare, this not being a matter indictable, the statute of 5 *Ann. c.* 14. appointing a summary proceeding before justices of the peace; and cited *Rex* v. *James*, *Trin.* 1 *Geo.* where an indictment for keeping an alehouse was quashed, because the statute 3 *Car.* 1. *c.* 3. had directed a particular remedy. *Et per curiam*, The indictment must be quashed.

5 Ann. c. 14. Indictment lies not for killing a hare. Sess. Cas. 370.

Parker *versus* Stanton.

TO the *scire facias quare executio non* upon a writ of error, the plaintiff in error pleaded, that the damages recovered were levied upon a *fieri facias*. And *Strange* moved to set aside this plea, saying it was never the intent of the court to give the party a liberty to plead to it, when it was only a method used to bring in the party to assign his errors; and that if this was to be once allowed, it would be done in all cases, and be an effectual method to get one term extraordinary upon every writ of error, by obliging the party to go to trial upon an issue to the *scire facias*, whilst the writ of error stood still for want of an assignment of errors. And he cited *Elmes* v. *Martin in B. R. Hil.* 10 *Geo.* where a plea of payment (which is the same in reason with the present case) was set aside. The Chief Justice at first made a difficulty of setting aside this plea because it might be true, and then why should the party be brought in to shew cause why there should not be execution, when it has been had already. But the other Judges made no difficulty of setting it aside, on account of the apparent delay that it would introduce. And if execution has been had, the defendant may go on with his writ of error to obtain a restitution. So after great debate the plea was set aside. And in the debate of this case it was said by the court, and the secondary, that if issue had been joined on this plea, and it had been found for the defendant in error, he might have taken out execution, but could not *non pros.* the writ of error, till after a rule to assign errors.

Practice in error. L. Raym. 1414.

After this errors were assigned; and when the cause came on to be argued, it appeared to be an action of trover *pro duobus instrumentis ligneis*, *Anglice stands*. And it was objected by *Fazakerley*, who cited *Cro. El.* 817. 1 *Lev.* 48. *Sti.* 327. that there was a proper *Latin* word for *stands*, and therefore *instrumentum ligneum*, which would serve for any thing made of wood was too general: but the court held it well enough, and the judgment was affirmed.

Instrumentum ligneum well enough in trover.

Welsh *versus* Craig.

Debt lies not upon a promissory note. 8 Mod. 373.

DEBT upon two promissory notes and a *mutuatus*. And on demurrer to the declaration, I objected, that an action of debt would not lie: that before the statute no action at all lay upon the note, as a note, (*Salk*. 129.) nor did an *indebitatus assumpsit* lie on a bill of exchange. And the only remedy given upon the note by the statute, is the same that was before on an inland bill of exchange. And of this opinion was the court, and pronounced judgment for the defendant. But then it was observed by Serjeant *J. Comyns* for the plaintiff, that there was one good count upon the *mutuatus*, and the demurrer was to the whole. Whereupon judgment was given for the plaintiff, which I believe it will be difficult for him to enter, so as to maintain it.

Goswill *versus* Dunkley.

In account a discharge to a common intent is sufficient.

IN account for a watch and sword delivered to the defendant, *ad mercandizandum*, he pleaded, that he carried them to *Porto Bello*, and in order to keep them safe, till he had a convenient opportunity to sell them, and put them into the warehouse of the *South-sea* company, and that the warehouse was broke open by enemies, and the watch taken away and lost, and that the sword had likewise been taken away, *nisi* an *Englishman* had put it it on and claimed it as his, and that the defendant was forced to come away before he met with the *Englishman* to get it again. And on demurrer

It was objected by Serjeant *Whitaker*, that this was no good discharge; and he cited 1 *Roll. Abr*. 124, 125. *Yel*. 202. 1 *Bulst*. 101. for these goods were delivered to the defendant under a special and particular trust; and that he could not defend himself against the plaintiff's demand, by shewing that he had lodged them in a warehouse, which was a committing them to the care of a third person, in which case he will be answerable for the loss.

Reeve contra. Though this is a personal trust, yet he is not bound to keep them always about him. If he was robbed of them himself, it is a discharge. 1 *Ven*. 122. 2 *Lev*. 5. 5 *E*. 4. 4. 9 *E*. 4. 40. *Et per curiam*, This is *prima facie* a good account: if the warehouse was not a place of safe custody, that should have been replied: a robbery there is the same as if from his own person, for a bailiff *ad mercandizandum* is not obliged to keep the goods always about him. At another day Serjeant *Hawkins pro quer'* endeavoured to maintain the action, but

but the court ſtood to their former opinion, and gave judgment *pro defendente*.

Short *verſus* King.

THE plaintiff declared in ejectment on one demiſe, to which there was Not guilty pleaded; but afterwards finding it neceſſary to add the demiſe of the truſtees, he delivered a new ejectment on the double demiſe. Whereupon I moved to ſtay the proceedings on this laſt, till payment of the coſts, and for notice where the leſſors were to be found; and grounded my motion for the firſt part on Lord *Coningſby*'s caſe, and for the latter on the common caſe of a *qui tam*, becauſe here the leſſor was to enter into a rule for coſts. The court granted the laſt part, but as to the coſts they ſaid it was never done, but where it appeared the party was vexatious, or had run the defendant to a great expence, which was Lord *Coningſby*'s caſe, who came for a trial at bar on his new ejectment, after the former cauſe was ready for the bar, which was a matter of mere favour, in which they might make their own terms.

Practice in ejectment. 2 Barnard K. B. 224. S. C. but not S. P.

Ante, 548.

Dobs *verſus* Edmonds.

THE plaintiff declared in treſpaſs with a *quod cum*, and then went on to another treſpaſs, which was introduced with a *necnon de eo quod*, &c. The verdict was *pro quer'* as to the laſt part, and *pro def'* as to the treſpaſs under the *quod cum*. And it was moved in arreſt of judgment, that the whole was but recital. *Sed per curiam*, We muſt not extend that exception, which has gone far enough already: the latter part is by way of poſitive charge, and the finding of the jury has cured it as to the firſt. The plaintiff muſt have judgment.

Necnon de eo quod after a *quod cum* is a poſitive charge.
L. Raym. 1413.

2 Show. 295.
Cro. Jac. 536.

White *verſus* Cleaver.

DEBT upon a bond conditioned to indemnify the plaintiff. The defendant upon *oyer* pleaded generally, *quod indempnem conſervavit*, without ſhewing how. And on a general demurrer it was agreed the plea was ill before the act for amendment of the law, for that no iſſue could be joined upon it. 2 *Cro.* 165. *Hob.* 296. 2 *Co.* 4. 2 *Cro.* 363, 503, 634. But then it was objected, that this ſhould have been ſhewn for cauſe of demurrer. And of that opinion was the court, for the ſubſtance is the ſaving harmleſs, and how that was done, is

Where a plea is general *quod idempnem conſervavit*, it muſt be ſhewn for cauſe that it does not ſay *how*.
L. Raym. 1449. 1416.
Forteſc. Rep. 333.
Barnard. K. B. 4.

2 Lev. 194, 283. is but matter of form; so the plaintiff prayed leave to discontinue upon payment of costs, which was granted accordingly.

Portman *versus* Came.

Where executor must declare as executor, he shall pay no costs. L. Raym. 1413, cited in Andrews 357.

THE plaintiff brought an action of debt upon a bond as executor, and upon *oyer* it appeared to be conditioned, "that the defendant should not hunt in any of the lands of the testator," and in the replication, a breach was assigned by a hunting in the time of the executor; and a verdict for the defendant.

And now Serjeant *Chapple* moved for costs, because the hunting, which was the cause of action, arose in the time of the executor, and was a matter within his knowledge. 6 *Mod.* 91. 181. 1 *Ven.* 92. *Sed per curiam*, The cases are only where he needed not declare as executor; and so was *Baller* v. *Delander*, *Trin.* 1 *Geo. in B. R.* But here the bond was the cause of action, and he was obliged to declare as executor; and therefore they denied costs.

Lat. 214, 220.

See 3 Bur. Rep. 1451.

Lady Cass *versus* Title.

Verdict incertain.

ERROR of a judgment in *C. B.* in ejectment on four demises of a different commencement and continuance: verdict for the plaintiff against two defendants only as to one third part of 28 acres of meadow; and as to the rest of the premisses, and all the other defendants, Not guilty: upon which there is judgment, that the plaintiff should recover *terminum suum praed' de et in praed' una tertia parte praed' 28 acrarum prati* against the two defendants who are found guilty, and that the acquitted defendants shall recover 7 *l.* costs.

Upon this judgment the two defendants, who were found guilty as to part, bring a writ of error, and assign the general errors. And *Strange pro quer' in errore* objected, that the verdict and judgment are uncertain.

1. For that the plaintiff declares on four several demises of a different commencement and continuance, and yet the judgment is only to recover *terminum suum praed'* in the singular number, without determining which of the terms he shall recover. *Hil.* 4 *Geo. B. R. Hodson* v. *Backhouse:* the writ of error was *de quadam transf. et ejection' firmae* instead of *firmarum*, there being two demises: and quashed.

2. It

2. It is impossible for the sheriff upon this judgment to know what he is to deliver possession of, for there are four demises of four different 28 acres of meadow, and whether the plaintiff is to have those which *A.* demised, or those which *B.* or *C.* or *D.* demised, is uncertain; it should have been to recover the 28 acres of meadow which the first, or second, or third, or fourth lessor demised. 1 *Book of Judgments* 74. 2 *Ditto* 119. 2 *Roll. Abr.* 694. 1 *Roll. Abr.* 779. By this verdict no body can say which of the lessors title is established, nor can either of them bring an action upon it for the *mesne* profits.

Whitaker Serjeant *contra* did not offer to answer the objections, but said they would try below and get it set right: at present he took an exception to the writ of error, that it was only to remove a record of an ejectment between the plaintiff and the two defendants who are found guilty; whereas it appears by the record, that there were eleven other defendants to the suit: and though the writ can be brought only by these two *ad grave damnum* of themselves, yet the suit must be described as it really was. *Et per curiam*, So it should, and the case of *Cook* and *The Duchess of Hamilton* was cited. Then *Strange* insisted, that it was amendable by the late act; and of that opinion was the court, so the writ of error was amended. And as to the objections to the judgment, it was adjourned, to give the defendant in error an opportunity to set it right if he could.

Variance.

Dent *versus* Lingood.

THE defendant in error pleaded a release of errors, which was found for him; and the court ordered the entry to be, that the plaintiff should be barred of his writ of error, not *quod affirmetur*.

How the entry shall be where a release of errors is found.

Between the Parishes of Westham *and* Chiddingstone.

IT was stated, that a single woman settled at *C.* was married to a man who is since dead, but his settlement did not appear: *Et per curiam*, Her settlement before marriage stands.

Woman's settlement before marriage remains, if husband has no settlement. *Mich.* 1 *Geo. int. parochs. Dunskwell* and *Upotery*, held so likewise. Sess. Cas. 104. S. P.

Hughes

Hughes *versus* Alvarez.

Writ of inquiry amended. 2 L. Raym. 1409. Cited by Andrews 78.

IN an action upon the case upon two promises, there was judgment for the plaintiff as to the first promise, and as to the second a *nolle pros.* A writ of inquiry is taken out to inquire what damages the plaintiff had sustained *occasione praemissorum*, and upon the return of this it was moved to amend the writ, and make it *occasione non performationis praed' primae promissionis:* and upon the authority of *Baker* v. *Cambell*, *Pas.* 4 *Ann. in B. R.* the writ was amended in this case, the record of the judgment by default being a warrant to amend by.

Haywys *versus* Savage.

Upon a special *capias* by original the defendant shall not be obliged to plead sooner than upon a common *latitat.*

A Special *capias* by original was taken out returnable *crastino animarum*, and for want of a plea to enter before the essoin day of *Hilary* term judgment was signed the 19th of *January*, which was now moved to be set aside. And it was agreed, that if this had been by bill, the defendant would not have been obliged to plead till within *Hilary* term. But I insisted, that it being a special *capias*, wherein the whole case was set out at large, it made it more reasonable, than where there is only a common *capias de placito transgressionis*. And it has been always taken to be for the expedition of the plaintiff, to sue out these special writs: whereas if this judgment be set aside, it will be putting them upon the same foot with a common *latitat*. The fact and practice was certainly on my side, but the court, out of a disinclination to favour proceedings by original, would not allow there was any difference, but set aside the judgment: so that now there is no advantage in taking out a special *capias*, and therefore I suppose it will be discontinued.

Helbut *versus* Held.

No error to be assigned contrary to the record. L. Raym. 1414.

ERROR of a judgment in *C. B.* after verdict for the plaintiff. And it was assigned for error, that *Edward Richeir*, who was sworn as a juror returned upon the principal pannel, was never returned by the sheriff; and also that there was diminution in the record, for want of the *venire facias* and *habeas corpora*. And to this *in nullo est erratum* was pleaded.

Parker

Parker pro quer' in errore objected, that *in nullo est erratum* was a confession of the errors assigned, and then no doubt but that in point of law the swearing a person upon the jury, who was never returned by the sheriff, will make such an error in the proceedings, as will overthrow the judgment. 5 *Co.* 42.

Strange contra. I admit that where a matter of fact properly assignable is assigned for error, *in nullo est erratum* will be a confession; but where the matter alleged is not by law assignable, there *in nullo est erratum* is a demurrer in law; it is insisting the party has no right to assign such a matter for error, and that therefore the defendant ought not to be drawn into an inquiry about the truth of it. And I take it the error here alleged is not assignable, as being contrary to the record: for after the joinder in issue, the record goes on to the award of a *venire facias* returnable at such a day, *ad quem diem*, says the record, *jurata inter partes praed' ponitur in respectu* till the next term, *nisi prius* the Chief Justice comes to *Guildhall:* at which time he comes, *et juratores unde infra sit mentio exacti unus eorum*, (that is, one of those returned by the sheriff) *viz. Edwardus Richier ven' et in juratam illam juratus existit:* so that the record expresly says, that the *Edward Richier* who was sworn, was one of them that was returned by the sheriff; and therefore the error assigned is contrary to the record: and that such an error is not assignable, I rely on 1 *Rol. Abr.* 758. *pl.* 8. If *A. B.* is sworn upon the principal pannel, and another of the same name is sworn upon the *tales*; it shall not be assigned for error, that the *A. B.* first sworn and *A. B.* the *tales* man were one and the same person, so as to make it a trial by eleven jurors only; for that this (says the book) is contrary to the record, which says that they who were sworn upon the *tales* were *alii de circumstantibus:* he could not be *idem* consistently with the record, which says that he was *alius:* and therefore such an averment, contrary to the record, is not to be admitted.

As to the diminution alleged, I shall make no difficulty, after a verdict, of admitting even that there are no such writs at all.

Et per curiam, The case in *Rolle* is exactly in point, and according to the reason of the law in other cases: therefore the judgment must be affirmed.

Dominus Rex *versus* Popplewell.

In conviction for swearing the the oaths must be set out. Sess. Cas. 356.

CONVICTION for profane cursing and swearing was quashed, for want of the particular oaths and curses being set out.

Anonymous.

Mandamus.

STRANGE moved for a *mandamus* to be directed to the churchwardens of *St. Botolph Bishopsgate*, commanding them to call a vestry in *Easter* week, for the election of churchwardens: but the court refused it, saying there was no instance of such a *mandamus*, and they could not take notice who had a right to call the vestry, and consequently did not know to whom it should be directed.

Dominus Rex *versus* Betts et al'.

Amendment on the crown side.

TO a *scire facias* on the crown side upon a recognizance for keeping the peace, the defendant as to the breach assigned pleaded Not guilty, but concluded with an averment, instead of concluding to the country: and after a demurrer, I moved to amend the plea: and the court gave leave to amend it accordingly.

Dominus Rex *versus* Pappineau.

What judgment ought to be entered on a conviction for a nusance. 2 Sess. Cas. 34.

THIS was a writ of error directed to the justices of the peace of the county of *Surrey*, to remove a conviction for a nusance upon an indictment setting forth that the defendant such a day, *Super quendam rivum sive aquae cursum ibidem vocat' Wandle prope adjacen' et contigue adjungen' communi altae viae Regiae ibidem vocat' Tooting-Lane, necnon prope separales domus mansionales diversorum ligeorum et subdit' dicti Domini Regis, erexit et aedificavit quandam molam depsere coria* (*Anglice* to dress hides) *et macerare cutes ovium in aqua* (*Anglice* to steep sheep skins in water) *et quod praed'* (*def'*) *apud molam praed' depsuit et maceravit triginta cutes ovium magnum foetorem et insalubrem odorem emittentes, et easdem cutes in quodam loco ibidem prope communem altam viam Regiam praed' posuit et locavit, per quod aer ibidem maxime corrumpebatur et adhuc corruptus et infectus existit ad commune nocumentum, &c.*

After Not guilty pleaded a trial is had, and the defendant found guilty; upon which the judgment of the court is entered, that

that the defendant be fined 100*l.* for the said nusance, *et capiatur*, *&c.* Upon this judgment the general errors are assigned, and the coroner and attorney pleads *in nullo est erratum.*

Strange pro querente in errore argued, that this should be reversed. And his first objection was, that as it was laid, it was not a fact indictable, it not being laid to be *in*, but *near* the highway; for the *per quod aer ibidem* must refer to the erection, which is laid to be upon a rivulet *near* the highway; and if it be not *in* the highway, an indictment will not lie. *Sed per curiam*, Surely this is well enough. If a man erects a nusance *prope adjungen'* to the highway, *per quod* the air thereabouts is corrupted; it must in its nature be a nusance to those who are in the highway, and therefore the indictment is well enough.

Then I went on to another objection (and which I principally relied upon) that the judgment was erroneous for want of an adjudication that the nusance be abated. The end of the law in giving an indictment for a publick nusance is, to have the whole removed by one suit, and to avoid a multiplicity of actions. And it is preferred before an action upon the case, because in that each party can only recover his separate damages; whereas upon an indictment there may be an end of the thing at once. By these indictments the publick inconvenience is to be removed, which can be no other way effected, than by a judgment to abate the nusance; for as to a fine, the publick is never the better for that, and a man in many cases may find it worth his while to pay a fine, and continue the nusance, in which case the publick has no redress.

In the case of the *King* v. *Walcot*, which was an attainder for high treason, the words *ipso vivente* were omitted, and that was held a sufficient error to reverse that attainder; and yet that is not in so material a part as this; for there being a judgment that he should suffer death, (which is *extremum supplicium)* it was but an omission in the form; but the court said that the common law having made that part of the judgment, it was not in the power of the court to omit it: in this case the principal judgment that the law has appointed is, that the nusance be abated, to which the court may add the further punishment of a fine; but unless they give judgment to abate the nusance, the publick is no better for this prosecution, but there must be a multiplicity of actions, which it is against the policy of our law to admit, where it may be prevented. The interest of the publick is so great, that in *Salk.* 458. it is held, that for the concern of the publick an act of general pardon shall take away the fine, but not the abatement. And an indictment for a nusance is not good, unless it concludes *ad*

Salk. 632. 4 Mod. 395. Cumb. 369. Parl. Cas. 127.

ad commune nocumentum of the King's ſubjects: which ſhews that the removing the common nuſance is the chief end of the indictment.

There are few precedents to be found of theſe judgments entered at large. *Bro. Nuſance* 39. it is ſaid how the judgment ought to be, which is an abatement and a fine; and in the *Old book of Entries* 144. *b.* in an aſſize of nuſance for diverting a water-courſe, the entry is, *quod nocumentum praed' amoveatur et trenchea praed' obſtruatur.*

And it is no objection to ſay, that this is an error for the advantage of the defendant. It was for *Walcot*'s advantage to have that painful circumſtance omitted, but the court would not take that into conſideration, and held it ill, as varying from the judgment which the law had appointed. If upon an indictment for murder the defendant ſhould have judgment to be whipt; will any body ſay this is a good judgment, and yet ſurely it is for the benefit of the defendant.

Fazakerley contra. Every judgment muſt be according to the circumſtances of the caſe. This is not a permanent, but a tranſitory nuſance, in dipping of ſkins, and I do not know how that is to be abated: we may truſt the court in ſetting ſuch a fine as will be as effectual as an abatement: the defendant may have left off dipping his ſkins, and that is all the abatement the thing is capable of.

See 1 Burr. Rep. 259. *accord.*

C. J. Regularly the judgment ought to be, to abate ſo much of the thing as makes it a nuſance. 9 *Co.* 53. *Godb.* 221. *Winch* 3. If a houſe be built too high, ſo much of it as is too high ſhall only be pulled down. The caſes cited by Mr. *Strange* were of a permanent nuſance; but here erecting the mole is not the nuſance, (for it might be lawful to do that) but the nuſance ariſes from the uſe he puts it to. If a dye-houſe, or any ſtinking trade, were indicted, you ſhall not pull down the houſe where the trade was carried on. I think here could be no judgment to abate any thing, and therefore the judgment muſt be affirmed.

To which *Powys* J. agreed. *Et per Forteſcue* J. The queſtion is, whether in the caſe of a publick nuſance it is not neceſſary to give two judgments in all caſes. I am not ſatisfied this is not a permanent nuſance; the erecting is the cauſe of the nuſance, and the concluſion of the indictment *ad commune nocumentum* goes to the whole, as well the erection as the dipping. I remember the caſe of a glaſs-houſe, where the judgment was to abate the nuſance, not that the houſe ſhould be pulled down, but only to prevent his uſing it again as ſuch; which might have been done in this caſe, to prevent his dipping

dipping ſkins again. *Co. Ent.* 92. *b.* 9 *Co. Batten's* caſe : it appears the plaintiff could not go on for damages after the defendant had abated the nuſance, which ſhews an abatement to be the moſt neceſſary part. 2 *Roll. Abr.* 84. And as no inſtance is given, where the judgment has varied in purſuance of the diſtinction now ſet up between permanent and tranſitory nuſances, I am of opinion that this judgment is erroneous, and ought to be reverſed.

Reynolds J. I think the judgment is right. Every judgment ſhould be adapted to the nature of the caſe: where the erection is the nuſance, there ought to be a demolition: roaſting of coffee was formerly thought a nuſance, and yet no body ever imagined the houſe in which it was roaſted ſhould be pulled down: and what other way is there to abate ſuch a nuſance? A glaſs-houſe is a nuſance in its own nature; but this is a lawful act, provided the ſkins which are dipt are not ſtinking ſkins. I ſhould think it would have been going too far, if they had adjudged the whole erection to be abated for a particular abuſe of it in dipping ſome ſtinking ſkins.

The Judges took further time to conſider of it; and in *Trinity* term following it was mentioned again, and all ſtanding to their former opinions, it was adjourned.

N. B. It was put in the paper about a year after, and no body appearing for the defendant, the judgment was affirmed.

Haſket *verſus* Strong. At the Rolls.

MR. *How* made a mortgage for 500 years, dated 9 *June*, 1720, to *Neal.* He afterwards made a mortgage in fee to the plaintiff; and *Neal* aſſigned to the defendant, who afterwards advancing more money took a conveyance of the inheritance, with an agreement that the term ſhould be kept on foot as an additional ſecurity: the term was never aſſigned over to a third perſon. And on the queſtion touching priority it was argued, that if the term had been regularly kept on foot, the defendant would have been in the common caſe of a third mortgagee taking in the firſt incumbrance to protect himſelf, by which he would have had the law on his ſide; whereas here the term was merged upon the grant of the inheritance, and therefore at law it would be with the plaintiff, who had the firſt mortgage in fee. To which it was anſwered, and decreed by the court, that the plaintiff's conveyance of the inheritance interpoſing between the term and the defendant's grant, the grant of the defendant was void in law, the grantor

Third mortgagee buying in the firſt ſhould be prior to the ſecond.

having nothing in him; and then the term could not be merged in a void grant of the inheritance, and the defendant must be first paid his whole money. *Strange pro defendente.*

Southerton *versus* Whitlock.

At Guildhall, coram Raymond *C. J.*

Infant bound by promise of payment at full age. Ld. Raym. 389. S. P.

IT was held, that if goods which are not necessaries, are delivered to an infant, who after full age ratifies the contract by a promise to pay, he is bound: and he left it to the jury whether there was any confirmation of the contract at full age.

Lambell *versus* Pretty John.

Error *coram vobis* lies not after affirmance in Exchequer Chamber. 1 Roll. Abr. 755. pl. 16.

JUDGMENT was given in *B. R.* in trespass, and on error in the Exchequer Chamber the judgment was affirmed. The defendant then brought a writ of error *coram vobis in B. R.* which Mr. *Parker* moved to quash, and cited 1 *Ven.* 207. 2 *Lev.* 38. 3 *Keb.* 28, 29. that it will not lie after an affirmance.

Belfield Serjeant insisted, the record never was removed from *B. R.* and that debt would still lie upon it. *Sed per curiam,* Before the statute of *Eliz.* we could not examine our own errors in fact after an affirmance in Parliament: and the Exchequer Chamber is now in the same degree with regard to us, as the Parliament was before. The writ of error must be quashed.

East-India Company *versus* Pullen.

At Guildhall, coram Raymond *C. J.*

If I send my servant with the goods, the carrier is not liable.

ACTION against the defendant as a common carrier, on an undertaking to carry for hire on the river *Thames* from the ship to the company's warehouses. Upon the evidence it appeared, the defendant was a common lighterman, and that it was the usage of the company on the unshipping of their goods to clap an officer, who is called a guardian, in the lighter, who as soon as the lading is taken in puts the company's lock on the hatches, and goes with the goods to see them safe delivered at the warehouse. It appeared to be done so in this case, and part of the goods were lost.

The Chief Justice was of opinion, this differed from the common case, this not being any trust in the defendant, and the goods were not to be considered as ever having been in his possession, but in the possession of the company's servant, who had hired the lighter to use himself. He thought therefore the action was not maintainable, so the plaintiffs were nonsuited. *Strange pro quer'.*

Price *versus* Brown.

At Guildhall, coram Raymond *C. J.*

UPON payment after the day and before bringing the action, it was pleaded to be a payment of the principal and all interest then due: on evidence it appeared a gross sum was paid, which upon computation did not amount to the full interest, but it was sworn that the plaintiff accepted it in full. I objected, that they ought to prove it as they had pleaded; but the Chief Justice thought it well enough, upon which there was a verdict. And the next term I moved on affidavits of the falsity of the defence, and that we did not expect any defence, and therefore were not ready to contradict the single witness who swore to the payment of the money. But the court would grant no new trial, saying it would be of dangerous consequence, to suffer people to be setting up new evidence, after they knew what was sworn before.

Evidence.

No new trial where party might have had evidence on first trial.

Chambers *versus* Robinson.

IN an action for a malicious prosecution of an indictment for perjury, the Chief Justice allowed the plaintiff to give in evidence an advertisement put into the papers by the defendant of the finding the indictment, with other scandalous matter, though an information had been granted for it as a libel, not (as he said) that the jury were to consider it in damages, but only as a circumstance of malice.

Evidence. Barnard. K. B. 22. S. C. but not S. P.

Upon the trial it appeared, the perjury was ill assigned, so that the now plaintiff could not have been convicted; and that exception was taken to it by the judge, and he was acquitted without examination of any witnesses. But the Chief Justice held the action lay, though it was a faulty indictment, relying upon the case of *Jones* v. *Gwynn*, where the distinction in *Salk.* 13. was denied, and held by the whole court that the action

Action lies for malicious prosecution of a bad indictment.

Salk. 15. 10 Mod. 148, 214. Gilb. Cas. Law and Eq. 185.

action would lie, though the indictment was bad; a bad indictment serving all the purposes of malice, by putting the party to expence, and exposing him, but it serves no purpose of justice in bringing the party to punishment if he be guilty.

New trial granted for excessive damages, but the same damages being given a second time, another trial cannot be had.

Whereupon the jury gave the plaintiff 1000 *l.* damages, and the next term the defendant moved the court for their judgment upon this point, (which was saved at *nisi prius*) and for leave to move for a new trial after the court had given their opinion upon the point, which was granted: and as to the point of law, the court made no difficulty of agreeing with the case of *Jones* v. *Gwynn*, and the defendant's counsel did not seem to thiuk the reason and authority of that case was to be shaken.

Then the defendant moved for a new trial on account of the excessiveness of the damages; and the court said it was but reasonable he should try another jury, before he was finally charged with 1000 *l.* So a new trial was granted upon payment of costs. And a new trial being had, the same damages were given again; upon which the defendant applied to the court, who said it was not in their power to grant a third trial; and so is *Salk.* 649. the case of *Clerk* v. *Udal.*

2 Salk. 649. pl. 25. 6 Mod. 22.

Eafter Term

12 Georgii Regis. In B. R.

Sir Robert Raymond, *Knt. Lord Chief Juftice.*

Sir Littleton Powys, *Knt.* }
Sir John Fortefcue Aland, *Knt.* } *Juftices.*
James Reynolds, *Efq;* }

Sir Philip Yorke, *Knt. Attorney General.*

Charles Talbot, *Efquire Solicitor General.*

Lorymer *verfus* Hollifter.

THE bailiff, who had a writ againft the defendant, came to Mr. *Stapleton* an attorney, and told him the defendant defired he would back the writ, and appear for him; and afterwards upon the plaintiff's attorney's applying to him, he told him he had fent orders to his agent to appear, and he believed he had done it. Whereupon the plaintiff's attorney delivered a declaration, and figned judgment for want of a plea. Upon motion to fet it afide, it appeared the bailiff went of his own accord to Mr. *Stapleton*, without the direction of the defendant, and that Mr. *Stapleton* difcovering this, had countermanded the orders for appearing, and that in fact there was no appearance. But the court refufed to fet it afide, and faid they would * oblige *Stapleton* to file common bail according to his undertaking, in order to make the proceedings regular, there being no fault in the plaintiff's attorney. *Strange pro quer'.*

Where an attorney undertakes to appear the court will oblige him to do it in all events.

* Not unlefs attorney has *figned* undertaking, *writing* it not fufficient. Loft 192, 193.

Noke *versus* Windham.

Practice. 2 Stra. 932. Caf. temp. Hardw. 56. Tri. at Ni. Pri. 105.

THE lessor of the plaintiff being an infant, the court obliged him to name a good plaintiff, who might be answerable for costs.

Eden *versus* Wills.

The *scire facias* in error must be returnable as the original process was. L. Raym. 1417.

AN action was commenced in *C. B.* by writ of privilege, which was returnable at a day certain: after judgment for the plaintiff a writ of error was brought, and a *scire facias quare executio non* was taken out, returnable at a general return. And upon motion to set it aside, the matter was stirred several times. And after consideration and search of precedents, the *scire facias* was set aside, for that it ought to pursue the nature of the first process: and whereas in the common case of actions by original in *C. B.* the process upon error in *B. R.* must pursue that, and be returnable at a general return; so where the proceeding below is by attachment of privilege, which is returnable at a day certain, the proceedings here must be returnable in the same manner. And a case was cited of *Vavasour* v. *Parker*, *Trin.* 11 *Ann.* where it was so ruled. *Thes. Bre.* 121. The writ was quashed, but without costs.

Courtney *versus* Satchwell.

An immaterial traverse must be shewn for cause of demurrer. Fortesc. Rep. 380.

IN trespass, assault, and false imprisonment, the defendant justifies under a process out of the sheriff's court in *London*, *quae est eadem*, &c. and traverses being guilty *aliter vel alio modo*: to this the plaintiff demurs, and shews for cause, that the traverse is idle, and unnecessary. And upon argument the court were of opinion, that this was ill on a special demurrer, the *quae est eadem* being a sufficient traverse. *Lutw.* 1457. And so it was held in the case of * *Carvil* v. *Manby*, where on a general demurrer it was allowed to be well enough; but the court said if it had been a special demurrer, it would have been otherwise. *Judicium pro querente.*

* Fortesc. Rep. 379. 8 Mod. 30.

Lister

Lister *versus* Baxter.

LISTER being master of a ship that was in distress at sea, put in at *Amsterdam*, and there borrowed 60*l.* of *Baxter* to repair the ship, and hypothecated it for repayment of the money. The money not being paid, *B.* libelled in the admiralty; whereupon a prohibition was moved for, on account of it's being a contract at land; and it not appearing by the words of the contract, that the ship was upon her voyage, it would be presumed she was only to begin her voyage from *Amsterdam*.

The master ca[n]not hypothec[ate] the ship befor[e] the voyage be[-]gins.

But the court was clearly of opinion, there should go no prohibition; it appearing by the libel, that the ship was upon her voyage; and if she was not, it might be pleaded below, which would oust the admiralty court of jurisdiction; the master having no power to hypothecate the ship in port, before she set out upon her voyage.

Sir Thomas Hales *versus* Taylor.

THE plaintiff having brought an action against the defendant for diverting his water, the matter was referred to arbitration, and the arbitrators awarded the defendant to fill up a canal, restore the stream to its former course and to do several other matters relating to his water-works. The plaintiff afterwards applied to the court for an attachment for non-performance of the award, and read several affidavits to prove it. The defendant on the other side read affidavits, to prove his compliance with the directions of the award. Whereupon the court said, it was discretionary whether they should enforce the award by an attachment; and there being a contrariety of evidence, they would not determine it by affidavits, since the plaintiff was not without another remedy, by action upon the award.

Executing an [a]ward by proce[ss] of contempt i[s] discretionary.

Sullivane *versus* Seagrave.

ERROR of a judgment in ejectment *in B. R.* in *Ireland de parte domus cognit' per nomen de le Three Kings in A.* And it was objected, that an ejectment would not lie *de parte domus*, and that the sheriff could not know of what part he was to deliver possession, and 2 *Roll. Rep.* 483. 11 *Co. Savil*'s case. 4 *Mod.* 166. *Mo.* 702. *Lutw.* 974. *March* 97. *Salk.* 254. were cited.

Ejectment lie[s] *de parte domus*

 But

But the court was of opinion, it was well enough, the ſituation of the houſe being ſufficiently deſcribed, and the ſame certainty is never required in an ejectment as in a *praecipe*.

Then exception was taken, that the record was not well returned; the writ of error being directed to *William Witched* Chief Juſtice, and the return is only by *William Witſhed* without adding *capital' juſtic' infra nominat'*, which *Forteſcue* Juſtice thought a material objection, and mentioned the caſe of the *Queen* v. *Somers* 7 *Annae*, which was a *certiorari* directed to the juſtices of the peace of *Oxon*, and the return was by two aldermen, without naming themſelves juſtices. *Sed per* C. J. and *Reynolds* J. (*abſente Powys* J.) Here are the words *prout interius mihi praecipitur*, which are enough to ſhew him to be the ſame perſon to whom the writ is directed: So the record being well removed, the judgment muſt be affirmed.

Caſe of the Borough of Chriſt-Church.

No trial at bar before iſſue joined.

UPON a motion for a trial at bar, which was conſented to on both ſides, it appeared iſſue was not joined: And the court refuſed to grant it, ſaying it was below the dignity of the court to do it, till they knew whether the iſſue joined would be a matter of difficulty or not.

Anonymous.

Mandamus.

A *Mandamus* was granted on Serjeant *Pengelly*'s motion, to ſwear in a director of the Amicable aſſurance, which is a company created by charter from the crown.

Ludwell *verſus* Hole.

Words not actionable. L. Raym. 1417. 4 Bac. Abr. 491, 493, 494. 2 Stra. 1169.

AFTER verdict for the plaintiff, who laid himſelf to be a gentleman, in an action for theſe words, '*You are a cheating old rogue, and have cheated the fatherleſs and widow.*' The judgment was arreſted for want of ſhewing the defendant to be a trader, or laying any *colloquium* of his trade. 5 *Mod.* 398. 1 *Rol. Ab.* 62. *Hardr.* 8. *Raym.* 62, 169.

Vat

* Vat qui tam *verſus* Green. * *Wyat.*

IN a *qui tam* on the ſtatute of uſury, I moved to ſtay proceedings, till notice given of the plaintiff's place of abode: After the rule was ſerved on the plaintiff's attorney, he ſends notice in writing that the plaintiff was in *Switzerland*, and was going on with the action: Upon which I moved a ſecond time to ſtay proceedings, till the plaintiff's return from *Switzerland*, or ſecurity given for the coſts, which is the reaſon the common rule is founded upon: And after hearing Mr. *Huſſey* for the plaintiff, the court made a rule according to my motion, and ſecurity was given for coſts. Practice. 12 An. ſt. 2. c. 16.

Rig *verſus* Wilmer.

ACTION by the plaintiff as aſſignee under a commiſſion of bankruptcy; and the declaration was, that the defendant was indebted to the bankrupt, and being ſo indebted he promiſed to pay to the bankrupt; but throughout the whole declaration there was no *aſſumpſit* to the plaintiff the aſſignee. Aſſignee of a commiſſion may declare on a promiſe to the bankrupt.

On demurrer it was inſiſted on by the defendant, that the ſtatute had transferred the promiſe to the aſſignee, and that a promiſe before made to the bankrupt was afterwards in point of law a promiſe to the aſſignee, and ought to have been declared on as ſuch.

Sed per curiam, What reaſon is there to differ this from the common caſe of an action by an executor where you always declare on a promiſe to the teſtator, and yet the promiſe is as ſtrongly transferred to the executor, as it is here to the aſſignee. Judgment for the plaintiff.

Foot *verſus* Prowſe. *Ante*, 625.

THE judgment of the Exchequer Chamber, whereby the judgment given in *B. R.* *pro defendente* was reverſed, being now affirmed in Parliament, the plaintiff came and moved for a peremptory *mandamus*: inſiſting that he had now falſified the return, and conſequently ſet aſide the defendant's excuſe. To which it was objected, that no peremptory *mandamus* ought to go, unleſs beſides the reverſal of the judgment given for the defendant there had been alſo a new judgment given for the plaintiff; that a peremptory *mandamus* is a judicial writ, and muſt be founded A peremptory mandamus may go before any formal judgment.

Salk. 428.

founded upon some judgment establishing the party's right that applies for it. *Parl. Ca. Philips* v. *Bury*. *Salk.* 431. 2 *Cro.* 206. *Yelv.* 74. 2 *Vent.* 295. *Pas.* 10 *Ann.* *Lidd* v. *Rodd*, *Trin.* 7 *Ann.* *Hicks* v. *Sherburn*.

To which it was answered, that here was every thing done by the plaintiff that was possible for him to do, for he can have no new judgment, the Exchequer Chamber and House of Lords being confined only to reverse or affirm.

And the whole court were of opinion, that a peremptory *mandamus* ought to go; for this was not a judicial writ founded upon the record, but is a mandatory writ, which the court always grants, when they are satisfied of the parties right: The reversal of our judgment is declaring the opinion of the superior court, that the plaintiff had a right; and there is no occasion for any new judgment. We every day grant peremptory *mandamus's* on producing the *postea*; which shews a formal judgment is not necessary. A peremptory *mandamus* was awarded.

Dominus Rex *versus* Inhabitantes de Leofield.

Poor.

AN order of removal whereby *J. S.* was adjudged *likely to become chargeable*, without saying *to the parish from whence removed*, was confirmed.

Dominus Rex *versus* Warre et al'.

Caption *ad festum Epiphanii* ill.
2 Seff. Caf. 5.

UPON demurrer to an indictment, the caption appeared to be, at a sessions held *ad festum Epiphanii* instead of *Epiphaniae*: and it was insisted *pro defendente*, that this was a different time from that prescribed in the statute, for *Epiphanius* is in the *Roman* calendar, and was a bishop of *Salamis* in the time of the Emperor *Theodosius*: and the court held it ill, and gave judgment for the defendant.

Mr. Delamotte's case.

No writ of privilege against a justice's being constable.
13 & 14 Car. 2. c. 12. § 15.
Seff. Caf. 344.

HE was a justice of peace in *Kent*, and lived at *Blackheath* and in *London*. And being appointed constable in *London*, Serjeant *Cheshyre* moved for a writ of privilege, and cited *Cro. Car.* 585. But the court denied it, saying they had nothing to do with it, but the proper method was under the statute *Car.* 2. to apply to the sessions.

Sisney *versus* Nevinson.

THE plaintiff had brought an action of debt upon a bond against the defendant as administratrix; and filed a bill in equity to discover assets; and had instituted a suit in the spiritual court, to oblige her to give in an inventory. After judgment for the plaintiff in the action, a writ of error was brought *in B. R.* and the judgment reversed: then the plaintiff brought a new action *in B. R.* And the defendant moved to stay proceedings, upon the act for amendment of the law, on paying principal, interest and costs. And now upon motion for the court's direction to the master in taxing the costs, it was insisted for the plaintiff, that the defendant ought to pay the whole costs of the first suit, the proceedings in Chancery, and the spiritual court: And the case of *Merril* v. *Jocelyn*, *Trin.* 13 *Ann.* was mentioned for this purpose. Costs. 4 Ann. c. 16

Sed per cur', We have nothing to do to order costs for proceedings in another court, which has a power to award costs, if the party is intitled to them; and as to the judgment, that is reversed, there is no reason why the defendant should pay for the error and mistake of the plaintiff. We are of opinion, the proceedings in this cause must be stayed on payment of the costs of this suit.

Dominus Rex *versus* How.

INdictment against the defendant, for that he *quendam Nich'um Carew*, *Baronettum*, being a justice of peace in the execution of his office, *per diversa scandalosa*, *minacia et contemptuosa verba abusus fuit*, *et ipsum in executione officii sui praedicti vi et armis illicite retardavit*. Upon demurrer to this indictment, it was objected by Serjeant *Darnall*, that it was too general, and that the words ought to be set out, that the court may judge whether they are indictable or not, according to the late cases of convictions for cursing and swearing, where the court has required the oaths to be set out. Indictment for words must specify what they were. *Vide* the resolution in Dr. *Sacheverel's* case St. Tri. viii. 566. 2 Sess. Cas. 31.

Strange contra admitted the indictment to be bad as to the words, but insisted that it was good as to the obstructing the justice in the execution of his office: and if any part of it be well laid, there shall be judgment for the King. Justices are indictable for neglecting their duty, and it is but reasonable to give them the same remedy against the obstructers. *Salk.* 380. Indictment too general.

Ea

Et per curiam, If any part of the indictment was good, we fhould not give judgment for the defendant. But this is bad *in toto*. *Retardavit* will hardly warrant calling this an obftruction; but if it would, furely fome act or other fhould be fet out. *Judicium pro defendente.*

The King *againft* the Inhabitants of Saint Mary the Virgin in Marlborough.

Order.
4 Seff. Caf. 52.

AN order was made upon the 43 *Eliz.* for a neighbouring parifh to contribute *fo long as we the faid juftices fhall think fit.* *Et per curiam*, It muft be quafhed, for the difcretion that is left in the juftices is, as to the *quantum*, and not as to the duration of the contribution.

Dominus Rex *verfus* Travers.

At Kingfton *Affizes*, Lent 1726, coram Raymond *C. J.* de B. R.

What age the law will allow an infant to be a witnefs at.

THE defendant was indicted the laft fummer Affizes, for a rape upon the body of a child, then little more than fix years old. And becaufe the Lord Chief Baron *Gilbert* refufed to admit the child as an evidence againft him, he was acquitted.

But at the fame Affizes an indictment was found againft him for an affault with an intent to ravifh the faid child. And this indictment coming now to be tried before *Raymond* C. J. the fame objection was now taken by *Comyns* and *Darnall* Serjeants, *viz.* that the girl being now but feven years of age, could not be a witnefs: they infifted that it had formerly been held, that none under twelve years of age could be admitted to be a witnefs, and faid that a child of fix or feven years of age, in point of reafon and underftanding, ought to be confidered as a lunatick or madman.

On the other fide it was faid, that in capital cafes, which concerned life, this objection might be allowed; but in cafes of mifdemeanor only, as this was, fuch a witnefs might be admitted: they infifted, that the objection went only to the credit of the witnefs; and *Hale's P. C.* fays, that the examination of one of the age of nine years has been admitted: and a cafe at the *Old Baily* 1698 was cited, where, upon fuch an indictment as this, *Ward* Chief Baron admitted one to be a witnefs, who was under the age of ten years, after the child

child had been examined about the nature of an oath, and had given a reasonable account of it.

But *Raymond* C. J. held, that there was no difference betwixt offences capital and lesser offences, in this respect. And that a person who could not be a witness in the one case, could not in the other. The reason why the law prohibits the evidence of a child so young is, because the child cannot be presumed to distinguish betwixt right and wrong: no person has ever been admitted as a witness under the age of nine years, and very seldom under ten. At the *Old Bailey*, in 1704, this point was thoroughly debated in the case of one *Steward*, who was indicted upon two indictments for rapes upon children. The first was a child of ten years and ten months, and yet that child was not admitted as a witness, before other evidence was given of strong circumstances, as to the guilt of the defendant, and before the child had given a good account of the nature of an oath. The second indictment against *Steward* was attempted to be maintained by the evidence of a child of between six and seven years of age: but it was unanimously agreed, that a child so young could not be admitted to be an evidence, and the child's testimony was rejected, without inquiring into any circumstances to give it credit. And it was merely upon the authority of *Hale's P. C.* where it is said, that a child of ten years of age may be a witness, that the other child of that age admitted to be a witness in the first indictment. And in the present case, the child was refused to be admitted a witness. And there not being evidence sufficient without her, the defendant was acquitted.

Bredon qui tam *versus* Harman.

At Guildhall, coram Eyre *C. J.* de C. B.

ACTION *qui tam* for not registring articles of apprenticeship according to the stamp act: the defendant pleaded *nil debet*: and upon the trial he offered in evidence a record of a recovery against him for the same forfeiture by another person, and so endeavoured to discharge himself by this under the plea of *nil debet*. And it was insisted for him, that if it appeared, that there was a recovery against him by another person for the same forfeiture, he was thereby discharged against all men, and owed nothing upon that account, and therefore it was very proper to give this record in evidence upon *nil debet*.

A former recovery not to be given in evidence on *nil debet* in a *qui tam*. *Strange pro quer'*.

But

But *Eyre* C. J. denied this record to be given in evidence, and said the defendant ought to have pleaded it, if he would take advantage of it; for if it had been pleaded, the plaintiff would have been at liberty to have replied *nul tiel record*, or that it was a recovery by fraud to defeat a real prosecutor, which he could not be prepared to shew upon this issue.

Dominus Rex *versus* Brotherton.

Selling meat on a *Sunday* no offence at common law. 2 Sess. Cas. 224.

INDICTMENT for exercising the trade of a butcher on a *Sunday*. And exception was taken, that it was not laid to be *contra formam statuti*, and it was no offence at common law. But the court refused to quash it, and put the defendant to demur; and afterwards upon demurrer judgment was given for the defendant.

Trinity Term.

12 Georgii Regis. In B. R.

Sir Robert Raymond, *Knt. Lord Chief Justice.*

Sir Littleton Powys, *Knt.*
Sir John Fortescue Aland, *Knt.* } *Justices.*
James Reynolds, *Esq*;

Sir Philip Yorke, *Knt. Attorney General.*

Charles Talbot, *Esq*; *Solicitor General.*

Dominus Rex *versus* Rhodes.

Pending a suit in the spiritual court touching the validity of a will, an indictment for forging it ought not to be tried. Cited in Wils. Rep. 75. and in St. Tr. XI. 213, 219, 233.

THE defendant exhibited a will in *Doctors Commons* as executor, and demanded probate: after a long contest there, it was determined in favour of the will; and upon appeal to the Delegates the sentence was confirmed.

Afterwards the parties who had been concerned in cooking up the will, fell out amongst themselves about the division of the estate; and thereupon it came out, that the will was forged, and upon full affidavits of the forgery a commission of review (which it was agreed was the only method to bring the matter over again) was granted by the Lords Justices; and an indictment was also found for the forgery, and stood ready for trial in *B. R.* Upon motion for a *habeas corpus ad testificandum* the Chief Justice declared, that he would not try the cause. For there being yet a sentence subsisting in favour of the will, and the validity of that being now put under a proper examination; he did not think it fitting to determine the property by an indictment, which would come on more properly after the sentence was reversed.

Dominus

Dominus Rex *versus* Davie.

Apprentice not to be discharged without a reason.

ORDER of sessions for discharging an apprentice was quashed, the only reason given for the discharge being, that the master declared in open court he would not take him again.

Sess. Cas. 282.

It was agreed to be a point not now to be disputed, but that the sessions had an original jurisdiction to discharge apprentices.

Dominus Rex *versus* Smith.

Nusance. 2 Sess. Cas. 6.

THE defendant was convicted on an indictment, for making great noises in the night with a speaking trumpet, to the disturbance of the neighbourhood: which the court held to be a nusance, and fined the defendant 5 *l.*

Dominus Rex *versus* Lewis.

Certiorari lies to *Wales* on indictments for misdemeanor. Sess. Cas. 312.

† See 4 Bur. Rep. 2456.

* See 2 *Bur.* Rep. 834.

INDICTMENT in the grand sessions of *Anglesea*, for embracery. And it was moved *ex parte def'* for a *certiorari*. It was admitted, that in capital cases, the *certiorari* lay by the 26 *H.* 8. *c.* 6. § 6. But it was contended for the prosecutor, that in cases of † misdemeanor it had never been granted: of which the court would advise. And at another day several precedents were produced, and *posteas*, where the indictment removed from the grand sessions had been sent down to be tried in an *English* county, and returned up to *B. R.* therefore in this case there being an affidavit, to induce a * suspicion, " that a fair trial could not be had in *Wales*," a *certiorari* was granted.

How affidavits must be intitled.

N. B. The affidavit was intitled *Rex* v. *Lewis*. And it was objected there was no such cause in this court. But the court said it was enough that there was a cause below between the *King* and *Lewis*, so the affidavit was read. At another day *inter.*

Regem *et* Jones.

Andr. 313.

THE affidavits on which an information was moved for had no title (which was agreed to be right) but the affidavits *pro def'* on shewing cause were intitled. *Rex* v. *Jones*. And upon objection to the reading them, the court said, that there

there being a rule in *B. R.* to ſhew cauſe why there ſhould not be an information, that was a proceeding in court between the *King* and *Jones*, and warranted the intitling the affidavits in that manner.

Onſlow *verſus* Booth.

A Plea of privilege of clerk to a prothonotary in *C. B.* was ſet aſide, the affidavit annext to it being *that this is a true plea*, and not *that the plea is true*, the ſtatute requiring the affidavit ſhould eſtabliſh the fact, and not the legality of the plea. Plea of privilege ſet aſide. Forteſc. Rep. 341.

Braceby *verſus* Dalton.

IN an action upon the caſe Mr. *Wynne* moved on affidavit that the defendant did not know the plaintiff, that the attorney for the plaintiff might give an account who his client was, and where he lived. But the court refuſed it, ſaying it had never been done but in a *qui tam*. Practice.

Powell *verſus* Gay.

IT was ſettled, that if the defendant craves *oyer* of any thing whereof he is intitled to have *oyer*, and it is not delivered in time; he ſhall have ſo many days to plead after the rules are out, as he demanded *oyer* before the rules were out. Practice.

Frontin *verſus* Small.

IN covenant, the plaintiff declares, that by deed made between her as attorney for *James Frontin* on the one part, and the defendant on the other part, ſhe demiſed a houſe to the defendant, and that he covenanted to pay the yearly rent of 60*l.* to *James Frontin*; and then aſſigns a breach in non-payment of rent, *ad damnum* of the plaintiff, who was the attorney. Where a warrant of attorney is given to execute a deed, it muſt be executed in the name of the principal. L. Raym. 1418. 8 Mod. 116.

Demurrer inde, and *Strange pro defendente* objected, that this is a void leaſe, and that no action can be maintained upon it, eſpecially by the plaintiff who was but the attorney, and to whom the rent is not reſerved: neither is it ſo much as a covenant *with the plaintiff*; but only generally *quod convenit* to pay the rent to *James Frontin*. The power is not purſued by a

leafe in the name of the attorney, for it ought to have been in the name of the principal. 9 *Co.* 76, 77. *Combes*'s cafe is exprefs, "If attornies have power to make leafes by indenture for years, "they cannot make the indentures, in their own names, but "in the name of him who gave the warrant of attorney;" and 1 *Roll. Abr.* 330, 501. *Godb.* 389. *Mo.* 71. it is faid fuch leafes are void. A warrant of attorney in the nature of it is only giving another a power to fet my name in my abfence, but not to enable him to act as owner of the eftate.

Reeve contra infifted, that the agreement that one fhall procure an entry and enjoyment, and the other fhall pay the rent, may be good, though the deed be void fo as to pafs an intereft in the land: and the word *dimifit* is a covenant, upon which an action will lie. 4 *Co. Noaks*'s cafe. And a leafe may be good referving rent to a ftranger who is no party to the deed; and fo is 1 *Mod.* 113. *Et per curiam*, no doubt but in a good leafe the rent may be fo referved, and that *dimifit* will amount to a covenant; but then that muft be where the deed is valid, as this is not: and if on the one hand it be void fo as to pafs an intereft in the land, it is but juft on the other hand that it fhould be void as to the refervation of rent: efpecially in this cafe, where the covenant is not *with the plaintiff*, nor the rent referved to her. Judgment for the defendant.

Chadwick *verfus* Allen.

What a regular note.

UPON demurrer to a declaration on the following note, it was held to be a note within the ftatute; "I do acknowlege that Sir *Andrew Chadwick* has delivered me all the "bonds and notes for which 400*l.* were paid him on account "of colonel *Synge*, and that Sir *Andrew* delivered me major "*Graham*'s receipt and bill on me for 10*l.* which 10*l.* and "15*l.* 5*s.* balance due to Sir *Andrew*, I am ftill indebted, and "do promife to pay." *Judicium pro quer'. Strange pro defendente.*

Manwairing *verfus* Sands.

In Middlefex, coram Raymond *C. J.* de B. R.

Hufband not chargeable for goods fold to adulterous wife. Salk. 116.

IN an action againft the hufband for a laced head fold to the wife; it was proved, that the wife lived from her hufband in adultery, and that fhe told the plaintiff fhe had a hufband, but that fignified nothing, for fhe would pay him herfelf: the Chief Juftice held the defendant not chargeable, and

and said he should have ruled it so, if there had been no actual notice, which only strengthened the case. *Strange pro defendente.*

Pepys *versus* Sir John Lambert.

At Guildhall, coram Raymond *C. J.*

THE third indorsee of a promissory note kept it from the first of *November* to the seventh of *January* without receiving it of the maker of the note: and in an action against the first indorsee, without notice, the plaintiff was nonsuited for his neglect. *Strange pro querente.*

Within what time a note ought to be demanded.

Dominus Rex *versus* Edwards.

* INDICTMENT for conspiring to marry a poor person settled in *A.* to a person settled in *B.* in order to bring a charge upon the parish of *B.* And on demurrer *judicium pro defendente*, because not an offence indictable. *Vide Salk.* 174. *pl.* 1, 2. *R. Raym.* 1167.

Indictment on *re gist.* 8 Mod. 320. Sel. Cas. 336. pl. 265. * See 3 *Burr.* Rep. 1320.

Wheeler *versus* Thompson.

ON a motion for a prohibition, it was held that a carpenter may sue for wages in the Admiralty. 2 *Ven.* 181. *Salk.* 33. 1 *Mod.* 93.

Carpenter may sue in the Admiralty.

Jenkins *versus* Purcel.

At Guildhall, coram Raymond *C. J.*

WHILST the jury were swearing, the defendant's counsel called for the record, and finding a mistake in it, said they would make no defence. The plaintiff's counsel upon this, in order to avoid a nonsuit, and to save the costs, refused to pray a *tales*; and though twelve had been sworn, yet there having been no actual prayer of a *tales*, the cause was suffered to remain for want of jurors.

Practice at *nisi prius.*

Turner *versus* Turner.

In Canc. coram King *Chancellor*, 14*th of* May 1726.

Infant pays no costs on a bill filed by the *prochein amy*. Sel. Cas. in Ch. 49. 2 P. Will. Rep. [illegible] pl. &c. but a year prior to the present report. 2 Eq. Cas. Abr. 238. pl. 18.

THE plaintiff being an infant, brings a bill in this court, by his *prochein amy*, to discover whether a will was cancelled by the defendant after the death of the testator, or by the testator himself. And upon the hearing, the court directed an issue at law, to try this point, and upon the trial of that issue, a verdict was found for the defendant.

Upon the day of trial of this cause the *prochein amy* dies, and within a short time afterwards the infant comes of age, but does not proceed any further in the suit.

The defendant brings on the cause upon the equity reserved, and the plaintiff's bill was dismissed with costs.

Upon which the plaintiff obtained a rehearing as to the point of costs. And for the plaintiff it was argued by *Talbot* and *Cowper*, that any person might bring a bill in this court in the name of an infant, which the infant could not discover whilst under age: that it would therefore be very hard to make an infant pay costs in a suit which might be commenced without his consent; and that it had never been the practice, unless the infant avowed the suit after he came of age, which made it his own act.

That the *prochein amy* was the person only relied upon for costs; and if at any time it appeared to the court, that he was not responsible for this purpose, the court upon motion would order a new one to be named, that was so: and in cases where it is necessary to examine the *prochein amy* as a witness in the cause, it can never be done till he is discharged from being *prochein amy*, and a new one named; because of his interest in the cause, in being subject to costs.

That they could not find one instance, where an infant under these circumstances ever paid costs: that they had searched the *subpoena* office, and found, that wherever an infant's bill was dismissed with costs generally, that the *subpoena* for costs was always made out against the *prochein amy*; from whence they argued, that the practice was to make him only liable.

A

A *feme covert* when ſhe ſues by *prochein amy* may be ſubject to coſts, but an infant is not; for a *feme covert* may at any time diſavow the ſuit, which an infant cannot: and this they ſaid was the diſtinction; and therefore inſiſted, that the plaintiff, in regard he had not proſecuted the ſuit after he attained his full age, ſhould not be made ſubject to coſts.

For the defendant it was argued by *Lutwyche* and *Mead*, that the infant and *prochein amy* were both liable, and ought to be ſo, otherwiſe the infant might be as vexatious as he pleaſed: at common law the judgment is always entered againſt the infant, and the execution follows the judgment; ſo that at law the infant here is liable to coſts; and there being in this caſe both coſts at law and in equity, a court of equity will not in ſuch caſes take from the defendant the remedy he has at law. It was admitted, that they knew of no precedent in this court, where the infant paid coſts; and therefore they would argue from caſes at law, which they ſaid were equally founded upon reaſon as caſes in equity: and the reaſon of the common law in ſubjecting infants to coſts, was in reſpect of their intereſt in the matters in controverſy. The *prochein amy* has not an abſolute power to carry on a ſuit without an infant's conſent; for upon application to the court on the behalf of the infant, ſuggeſting that the ſuit is not for his benefit, the court will refer it to a maſter, and if he reports it ſo, the court will ſtop the ſuit. The caſe of lord *Dudley* was mentioned, where an infant would have controverted an account before a maſter; but the court would not permit him to do it, till he had given ſecurity to anſwer coſts; from which it was inferred, that an infant ought to be made liable to anſwer coſts.

King Lord Chancellor, At common law no coſts were given either to plaintiff or defendant: but the plaintiff found pledges *de proſequendo*, and in caſe it was found againſt him, he was amerced *pro falſo clamore ſuo*.

Infants found no pledges at common law. The ſtatute of *Glouceſter* was the firſt ſtatute which gave coſts to demandants in real actions, and the power for infants to ſue by *prochein amy* was firſt introduced by the ſtatute of *Weſtminſter* 2. It was made general, and *Coke* in his commentary upon theſe ſtatutes ſays, that both guardian and *prochein amy* ought to be admitted by the court, and that no one can have a teſtamentary guardian for this purpoſe. I think it a proper power lodged in the court, that they may have reſponſible perſons: for at common law, if the guardian loſt the infant's land by miſpleading, the infant could not falſify the judgment; but a writ of deceit lay to recover

cover in damages against the guardian. I do not find that any case had been cited, where an infant plaintiff has been obliged to pay costs either at law or in equity: and in *Cro. Eliz.* 33. *Grave* v. *Grave*, an infant brought trespass by guardian, and was nonsuited; yet the court would not charge him with costs. And in another case, 1 *Bulst.* 109. the court seemed to be of the same opinion.

And the Chancellor having enquired, what was the practice, of the register, who said he had never known an infant liable in that court; he dismissed the bill without costs in equity; but left the defendant to recover at law, as he could.

Keilway *versus* Keilway.

Coram King *Chancellor*, 19 May 1726.

How the estate shall be distributed where there is a wife, a mother and brothers, but no children.
1 P. Will. Rep. 344.
Gilb. Eq. Rep. 189.
1 Eq. Cas. 253.
2 Eq. Cas. Abr. 442. pl. 48. in notes.

R. *Keilway* died intestate possessed of a considerable personal estate, and without issue, leaving a wife, and several brothers and sisters, and his mother living.

The wife under the statute of *Car.* 2. takes a moiety; and a question arising upon the statute 1 *Jac.* 2. *c.* 17. how the other moiety should be distributed, whether the mother should have the whole, or only a distributary share with the brothers and sisters, and to have the opinion of the court, a bill was brought; and upon hearing the Lord Chancellor was clearly of opinion, and decreed, that the mother should have no more than a share of the other moiety in common with the brothers and sisters of the intestate.

Hill *versus* Bateman & al',

Coram Raymond, *Chief Justice*, *at* Westminster.

Action lies against a justice for committing where there was no attempt to distrain first.
Sess. Cas. 344.

THE defendant *Bateman*, being a justice of peace, had convicted the plaintiff for destroying game, and though (as it was proved) the plaintiff had effects of his own which might have been distrained, which were sufficient to answer the penalty he had incurred, yet the defendant sent him immediately to *Bridewell*, without endeavouring to levy the penalty upon his goods: and an action of trespass and false imprisonment being brought against *Bateman* for this commitment, the Chief Justice was of opinion, that the action well lay.

The

The other defendant was the conftable, who had executed this warrant of commitment; and as to him it was agreed, that the warrant was a fufficient juftification, it being in a matter within the jurifdiction of the juftice of peace: but if a juftice of peace makes a warrant in a cafe which is plainly out of his jurifdiction, fuch warrant is no juftification to a conftable. See 24 *Geo.* 2. *c.* 44. 24 G. 2. c. 44.

And it was agreed, that where actions of this kind are brought againft juftices of peace, they are obliged to fhew the regularity of their convictions; and the informations, *&c.* laid before them upon which their convictions are grounded, muft be produced and proved in court. In thefe actions juftices muft fhew the regular proceedings.

Dominus Rex *verfus* Chipp. 4 & 5 W. & M. c. 23.

THE defendant was convicted upon the ftatute 4 & 5 *W.* & *M.* *c.* 23. for deftroying game; not being a perfon duly qualified. Conviction for game. Seff. Caf. 372.

Filmer for the defendant took feveral exceptions to the conviction.

1. That the information, which was fet forth in the conviction, was infufficient to warrant the conviction; for the information only recited that he was an *inferior tradefman*, but did not fhew that he had *wafted his fubftance*, or that he was a *diffolute perfon*, which are the words of the ftatute; and therefore it did not appear by this conviction, that the defendant was fuch a perfon as was intended by the ftatute, for he might be an *inferior tradefman*, and yet have a fufficient eftate to qualify him to hunt, *&c.*

2. That it was not any where fet forth in the conviction, that the defendant did *unlawfully hunt*; and for any thing which appears in this conviction, the defendant might have bought the hare; and have hunted and killed it in his own yard, which would have been lawful.

3. That the conviction fet forth, that information was given to fuch an one *juftice of peace*, but did not fay *adtunc* a juftice; and he might be a juftice at prefent, and not at the time of the information.

But the court over-ruled all the exceptions; and to the firft they faid, that the ftatute was in the disjunctive, *viz.* *inferior tradefman or diffolute perfon*; and therefore faying that the defendant was either was fufficient.

To the fecond, the court faid, that the ftatutes forbid fuch perfons as the defendant to *hunt at all*, and made it criminal for fuch perfons to *hunt* generally. And in this ftatute there is no diftinction betwixt *lawful* and *unlawful hunting*, as there is in the ftatute againft deer-ftealers; and they agreed, that in a conviction for deer-ftealing, it muft be fet forth, that the defendant did *unlawfully hunt*; but in the prefent cafe it need not, becaufe there is no fuch diftinction.

To the third exception the court faid, that the conviction fet forth, that information was made to fuch an one *exiften' un' juftic'*, &c. which muft be intended, that he was one at that time, and was fufficient without faying *adtunc*.

And fo all the exceptions were over-ruled, and the conviction confirmed.

Dawfon et ux' *verfus* Myer Mil'.

In the Exchequer Chamber.

7 G. ft. 2. c. 1. What are mutual covenants.

A Writ of error was brought in the Exchequer Chamber upon a judgment in *B. R.* in an action of covenant, in which the plaintiff declared, that in confideration of 730*l.* 10*s.* to be paid by the defendant, he (the plaintiff) covenanted on or before the 25 *March* then next, to transfer the produce of 634*l.* 7*s.* 6*d.* in lottery annuities fubfcribed by the plaintiff, and that the defendant covenanted to accept and pay; and the plaintiff fet forth, that the company allowed 173*l.* 16*s.* ftock upon the faid annuities, and then fets forth, that he made a tender thereof to the defendant upon the day, and that the defendant refufed to accept.

The defendant pleaded double, *viz.* that there was no tender, and that the contract was not regiftred. The plaintiff replied that the contract was duly regiftred, and offered an iffue, to which the defendant demurred; and as to the defendant's plea that the plaintiff made no tender, the plaintiff demurred.

And upon joinder in demurrer, the court of *B. R.* gave judgment for the plaintiff; for they faid, that there were mutual covenants, *viz.* an exprefs covenant from the defendant to pay the plaintiff 730*l.* 10*s.* and then a diftinct covenant from the plaintiff to transfer the produce of the annuities to the defendant; and the covenants therefore being mutual, they held that

that the tender was out of the case, and the plaintiff was not obliged to answer it; for if the plaintiff did not tender, the defendant had his remedy against him for not doing it.

A writ of error being now brought upon this judgment in the Exchequer Chamber, *Eyre* Chief Justice of the Common Pleas, *Gilbert* Chief Baron, *Price*, *Page* and *Hale*, Barons, and *Denton* Justice, were unanimously of opinion, that the judgment of *B. R.* was right, and they affirmed it accordingly.

Fazakerley was of counsel for the plaintiff in error, but he not attending there was no argument.

And *Strange*, who was ready to argue it for the defendant in error, only opened the case, because the court were clearly of opinion for his client upon the first opening. But the cases upon which he relied as authorities were these.

Blackwell v. *Nash*, *Mich.* 9 *Geo. ante*, 535. which was a covenant by the plaintiff to transfer stock to the defendant, and the defendant *in consideratione praemissor'* covenanted to accept and pay for it; and the court held that the words *in consideratione praemissor'* implied the covenant on the other side to transfer; and were held to be mutual covenants, and judgment *pro quer'*, which was affirmed in the Exchequer Chamber. 1 *Saund.* 319. *Pordage* v. *Cole*.

The case of *Wyvil* v. *Stapleton*, *ante* 615. which was affirmed in the House of Lords, was to pay *proinde adtunc* at the time of the tender; which is different from this case, for here the defendant's covenant is, to pay so much absolutely in satisfaction for the stock. The defendant here covenants to do two distinct acts, 1. to accept; 2. to pay; here is no *proinde*; and the words *in consideratione praemissor'* relate only to the covenant on the other side to transfer, and not to the actual transferring.

If the covenant of the defendant *ad idem tempus solvere* is to be confined to his acceptance, then it gives him the liberty of avoiding one contract by the breach of the other. In the case of *Wyvil* v. *Stapleton* there were not the words *ad idem tempus*, and those words in the present case are to be construed to be the time the defendant *agreed to accept the stock*, and not the time the plaintiff *does actually transfer*.

He had another exception to the defendant's plea, which was this: by the contract the plaintiff was to transfer the produce

of the ſaid annuities, with all dividends, profits, &c. and the plea only offers an iſſue as to the produce of the ſtock. So that it is putting that in iſſue, which, if found for the plaintiff, will not eſtabliſh the performance of the whole agreement on his part. This was as immaterial as the caſe of payment before the day; which has been often held ill, if found for the plaintiff. *Trin.* 13 *Ann*, *B. R. Merril* v. *Jocelyn.* So in *Hob.* 113. in debt upon an obligation for the payment of 10 *l.* 10 *s.* the defendant pleaded payment of 10 *l.* only, upon which they were at iſſue, and a repleader was awarded, though the defendant had pleaded that he paid it *ſecundum formam conditionis.* But this exception did not come before the court for their opinion: and judgment was affirmed upon the firſt point.

Upon which affirmance a writ of error was brought returnable in Parliament, where after the caſe was ſettled, and I was ready to argue it, the plaintiff in error ſubmitted, and paid the money.

END of the FIRST VOLUME.